SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF FAIRFIELD
AT BRIDGEPORT

S.C. 19493

STANDARD OIL OF CONNECTICUT, INC.
PLAINTIFF-APPELLANT

V.

ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT
DEFENDANT-APPELLEE

BRIEF OF DEFENDANT-APPELLEE
WITH ATTACHED APPENDIX

FOR THE APPELLEE:

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III. COUNTER STATEMENT OF THE CASE

This is a statutory appeal brought by Standard Oil of Connecticut, Inc. [hereinafter Standard Oil], from a determination by the Administrator that the company was engaged in an employer-employee relationship with certain named individuals who provided services as security system installers, heating and cooling equipment installers, and technicians who serviced heating and cooling equipment. The Employment Security Board of Review certified and filed with the court the record of proceeding pursuant to Conn. Gen. Stat. § 31-249b.

The record indicates that the Administrator made an initial determination on August 6, 2009, that Standard Oil was in an "employer-employee" relationship, as defined by the Act. The company filed a timely appeal on August 26, 2009 from the Administrator's initial determination. Following a full de novo hearing the Appeals Referee affirmed the Administrator and dismissed the appeal on August 16, 2011. The company next appealed the Appeals Referee's decision to the Board of Review on August 26, 2011. Conn. Gen. Stat. § 31-248. The Board of Review following a full de novo review of the record affirmed the Appeals Referee's Decision on March 21, 2012. Standard Oil then filed a timely appeal to this court on April 19, 2012. Conn. Gen. Stat. § 31-249b. On August 30, 2012, the company filed a timely motion to correct several of the Board's findings. The Board certified its decision on the motion to correct on March 4, 2013 to the trial court.[1]

[1] All of the adjudicative rulings by the Appeals Referee and Board of Review are attached for the convenience of the court. The instant appeal presents a volumous administrative record comprised of agency decisions, exhibits and transcripts, involving several days of hearings, totaling 1,525 pages.

Trial was held on the appeal on December 16, 2013 where the parties were fully heard and the issue joined. The trial court closed the proceeding and took the matter under advisement.

On March 24, 2014 the trial court, in a detailed ruling, affirmed the decision of the Administrator and dismissed the Appellant's appeal. From this decision the Appellant now appeals to this Court.

IV. ARGUMENT

A. STANDARD OF JUDICIAL REVIEW.

1. SCOPE OF JUDICIAL REVIEW UNDER CONN. GEN. STAT. § 31-222(a)(1)(B)(ii).

The trial court, in hearing an unemployment compensation appeal, does not decide the case de novo. The function of the court is to sit as an appellate court in reviewing the record certified to it by the Board of Review. United Parcel Service, Inc. v. Administrator, 209 Conn. 381, 385 (1988); Finkenstein v. Administrator, 192 Conn. 104, 112 (1984).

The same standard of judicial review governs unemployment compensation appeals involving an employer's assessment for unemployment compensation contributions. Conn. Gen. Stat. § 31-222(a)(1)(B)(ii); § 31-270; JSF Promotions, Inc. v. Administrator, 265 Conn. 413, 417 (2003). Pursuant to Conn. Gen. Stat. § 31-237j, there is an appeals process through the Board of Review to determine the employment status of Appellant's installers and technicians for purposes of such liability. Id.; First Federal Savings & Loan v. Administrator, Board Case No. 9031-BR-93, pp. 2-6 (May 11, 1994), Appendix, pp. A-36-40 (incorporating the appeals procedure for benefit eligibility cases and applying generally to Administrator decisions beyond benefit eligibility).

This limitation on judicial review is specifically applicable to an unemployment tax assessment appeal, pursuant to Conn. Gen. Stat. § 31-270, Latimer v. Administrator, 216 Conn. 237, 245 n. 9 (1990). The reviewing court is to determine whether the agency's conclusions are unreasonable, arbitrary or illegal based on the agency's findings of fact. Id.; JSF Promotions, Inc., supra, 265 Conn. 417. The trial court properly adhered to this standard. Memorandum of Decision (MOD) at 3-4.

The Appellate Court reviews the trial court de novo, performing the same task that the lower court did. Marquand v. Administrator, 124 Conn. App. 75, 79 (2010).

2. THE TRIAL COURT APPLIED THE CORRECT LEGAL STANDARD WHERE PLAINTIFF HAS FILED A MOTION TO CORRECT.

The Plaintiff Failed To Show That The Board's Findings Were Without Evidence.

Where the issue involves an application of a statute to the actual circumstances of a case, the record requires an appropriate finding of fact at the administrative level. United Parcel Service Inc. v. Administrator, supra; cited with approval in Acro Technology, Inc. v. Administrator, 25 Conn. App. 130, 593 A.2d 154 (1991). The court is bound by the findings of fact and reasonable conclusions of the Board of Review in determining whether the Board's decision is arbitrary, unreasonable, illegal or in abuse of its discretion. JSF Promotions, supra, 265 Conn. 417.

Even where the Plaintiff files a timely motion to correct, challenging specific findings of the Board, it is ultimately a question for the trial court to determine whether the Plaintiff demonstrated that the Board's ruling thereon violates P.B. § 22-9(b).

> (b) Corrections by the court of the board's finding will only be made upon a refusal to find a material fact which was an admitted or

> undisputed fact, upon the finding of a fact in language of doubtful meaning so that its real significance may not clearly appear, or upon the finding of a material fact without evidence.

Id. (Emphasis added.) The trial court properly adhered to this established standard of review. (MOD) at 13-14.

While the Plaintiff emphasizes that it filed a motion to correct, such a filing does not open the entire factual record to judicial review. Id. A timely motion to correct only applies to the specific factual findings of the Board challenged by the Plaintiff. P.B. § 22-4. A trial court only has such authority to review the challenged findings and the Board's response thereto. Id., P.B. § 22-9(b).

Therefore, it is clear that the Plaintiff must not only specify which findings it contests but must go further and establish one of the three bases for correcting such a finding. Id. The burden throughout this review is clearly upon the Plaintiff. Accordingly, the trial court must ultimately determine whether the Appellant has met that burden. (MOD) at 13-14. Here, the trial court properly found that Standard Oil failed to show that the Board's findings were "without evidence" or that the Board had failed to adopt a material, undisputed fact. (MOD) at 14-22, P.B. § 22-9(b). The trial court agreed with the Administrator's position on the standard of judicial review as to the binding effect of the Board's findings of fact, and considered the Board's legal conclusions in applying the statutory provisions of the ABC test. Id.

The issue, therefore, is whether the decision of the Board of Review and its ruling in response to Plaintiff's motion to correct specific findings, was unreasonable, arbitrary or illegal in determining, based on the certified record, that Standard Oil was an employer for

purposes of the Connecticut Unemployment Compensation Act (hereinafter Act) and, ultimately, that the trial court did not err in affirming the agency's decision thereon.[2]

Contrary to the Plaintiff's contention, the trial court applied the appropriate standard of judicial review in light of the motion to correct. Moreover, the trial court properly found that the Plaintiff failed to show that the Board's findings were without evidence.

The trial court's standard of review should be affirmed.

3. CHALLENGE TO THE BOARD'S FACTUAL FINDINGS.

The Plaintiff Did Not Prove That The Board Failed To Adopt A Material, Undisputed Fact.

The Plaintiff contends that the trial court erred in not reversing or modifying certain factual findings made by the Board. Appellant's Brief, 6-8.

In a detailed analysis of the factual challenges, in specific order, the trial court addressed each finding and found that there was an appropriate basis for the Board's conclusion. See (MOD) at 14-22, Findings of Fact (FOF) 22, 16, 6, 17, 13, 26, 18, 12, 14 and 15. As the trial court summarized:

> Finally, the plaintiff asserts that the board should have adopted a finding of fact stating that the installers/technicians do not receive instruction or direction from the plaintiff in performing their services. The plaintiff accurately states that this issue is key to Part A of the ABC test, regarding control and direction. The board and the plaintiff argue at cross purposes regarding this issue. The plaintiff cites to a plethora of evidence that it does not supervise the installers/technicians, is not physically present during installations and service calls, does not instruct or direct the installers/technicians on how to perform their services, and does not tell them the sequence of installation jobs or how to do the work. In response, the board states that the plaintiff instructs the installers regarding which parts to use, including requiring them to use parts that it supplies, and that the plaintiff directs the

[2] The trial court specifically addressed each of Plaintiff's challenges in response to the fact driven ruling on the Board's motion to correct. (MOD) at 14-22.

> installers/technicians when to perform their assignments. In addition, the findings of fact do cover some of the evidence which the plaintiff cites for this proposition. For example, Finding of Fact 5 states that installers are not supervised by the plaintiff and that the plaintiff does not inspect their work, and Finding of Fact 24 states that the plaintiff does not provide an employee handbook, pay for training or require any specific training. The general phrase "instruction or direction from Standard Oil in performing their services" could be applied to both instruction as to how to do the job, regarding which the plaintiff's evidence adheres, and as to when to do the job and what to use, regarding which the evidence cited by the board adheres. The board was therefore within its discretion in determining not to make the broad finding of fact urged by the plaintiff, and instead in making multiple findings of fact which cover much of the same material.

(MOD) at 21-22. (Emphasis added.)

There was no error in the trial court's analysis of the Board's ruling on Plaintiff's motion to correct. The Plaintiff failed to demonstrate to the trial court that the Board's findings were without evidence or that the Board failed to adopt a material undisputed fact. Id.[3]

[3] The record evidence supports the Board's decision. See FOF 22: (testimony of installer Brian Borschet) (10-20-10) (Sup. Rec. 65); FOF 16: Plaintiff testified all sales are dependent upon installations by installers/technicians (10-21-10) (Sup. Rec. 66); FOF 6: Equipment to be installed per Plaintiff's direction (10-20-10) (Sup. Rec. 66). FOF 17: Plaintiff: no difference between techs on service/cleaning contracts and regular employees. (Sup. Rec. 68). FOF 13: Work had to be performed within time frame on specific day. (Sup. Rec. 69); FOF 26: (testimony of David Cohen, VP re: Plaintiff's own employee do some alarm installations and, if necessary, furnace installations). Id. FOF 18: Walter Camp treated by Plaintiff as employee. (Sup. Rec. 70). FOF 12: No evidence that each I.C. has own customers. Id. FOF 14: Contract requires installers/techs maintain liability insurance. (Sup. Rec. 71). FOF 15: Installers and techs are paid set rate. (10-20-10). Id. Plaintiff directs/instructs installers and techs as to parts to be used, supplied by Plaintiff (10-20-10), and directs them when/where to perform assignment. (8-26-10). Id.

B. THE TRIAL COURT CORRECTLY APPLIED THE ABC TEST.

1. THE PRESUMPTION OF COVERAGE

Connecticut General Statutes §31-274(c) provides that "the provisions of this chapter shall be construed, interpreted and administered in such manner as ***to presume coverage, eligibility and nondisqualification in doubtful cases.***" (Emphasis added.) Thus, there is a well-established presumption under the Act that one's rendering of service to a company constitutes employment. Conn. Gen. Stat. § 31-222(a)(1)(B); Mattatuck Museum – Mattatuck Historical Society v. Administrator, 238 Conn. 273, 277 (1996). As the agency emphasized in its ruling, the burden of proof to disprove an employment relationship is squarely upon the Plaintiff:

> There is a presumption under the Connecticut Unemployment Compensation Act that service is employment unless and until the appellant can establish that the service comes within a specific exemption to the Act or unless and until the appellant can establish, irrespective of whether the common law relationship master and servant exists, that all prongs of the so called "ABC" test of General Statutes § 31-222(a)(1)(B)(ii) are satisfied. "Because the prongs of the ABC test contained in §§ 31-222(a)(1)(B)(ii)(I), 31-222(a)(1)(B)(ii)(II) and 31-222(a)(1)(B)(III) are conjunctive, the inability of the recipient of the service to satisfy any single one of those prongs necessarily results in a conclusion that an employer-employee relationship exists for purposes of the Connecticut Unemployment Compensation Act." Latimer v. Administrator, 216 Conn. 237, 252 (1990). In addition, General Statutes § 31-274(c) provides that the provisions of the chapter shall be construed, interpreted and administered in such a manner as to presume coverage, eligibility and nondisqualification in doubtful cases.

Board of Review's Decision (March 21, 2012) at 3, (Rec. at 834). (Emphasis added.)

The trial court properly recited and applied this standard in its analysis of the administrative record below and in reviewing the agency decision. (MOD) at 4. Moreover,

this standard has been endorsed by our Supreme Court. JSF Promotions, supra, 265 Conn. 417; Mattatuck Museum, supra, 238 Conn. at 278.

Lastly, the factual conclusions of the Board were made against the backdrop of the express legislative intent of the Unemployment Compensation Act. Conn. Gen. Stat. § 31-222, et seq. The time honored interpretation of the Act is that it is to be liberally construed as remedial legislation in favor of its beneficiaries. Mattatuck Museum, supra, 277-78; Taminski v. Administrator, 168 Conn. 324, 328 (1975). Indeed, the trial court recited this precise standard at the outset of its detailed, well-reasoned decision. (MOD) at 2-3.

This well settled presumption of coverage, for services rendered to a company, is applicable to Standard's appeal in the instant case, and was properly applied by the trial court in affirming the agency's factual determination of coverage under the Act.

2. THE TRIAL COURT PROPERLY SUSTAINED THE BOARD OF REVIEW'S FINDING UNDER PART A OF THE ABC TEST BECAUSE THE CLAIMANTS WERE UNDER THE CONTROL AND DIRECTION OF THE PLAINTIFF.

Part A of the so-called "ABC" test provides in relevant part that:

> Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that . . . such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact . . . .

Conn. Gen. Stat. § 31-222(a)(1)(B)(ii).

As Connecticut courts have determined, "[t]his control test is by nature a balancing test," and that "[m]any factors are ordinarily present for consideration, no one of which is, by itself, necessarily conclusive." Tianti, ex rel. Gluck v. William Raveis Real Estate, 231 Conn. 690, 698 (1995). The Supreme Court stated in Latimer, supra, 216 Conn. 247, that

the "fundamental distinction between an employee and an independent contractor depends upon the existence or non-existence of the right to control the means and methods of work." The court in Latimer, supra, 216 Conn. 248, further opined that "[a]n employer-employee relationship does not depend upon the actual exercise of the right to control," but that "[t]he right to control is sufficient." Therefore, the "decisive test" may come down to the following simple questions: "who *has the right* to direct what shall be done and when and how it shall be done." (Emphasis in original.) Id.

Among the factors the Board is to examine in determining employment, is the right to control the day to day activities of the workers, hours of work established, who furnishes the materials and the necessity to perform services, the ability of the individual workers to subcontract the work, the manner of remuneration, and the agreement between the parties. See Daw's Critical Care Registry, Inc. v. Dept. of Labor, 42 Conn. Sup. 376, 393-395 (1992), aff'd 225 Conn. 99 (1993). None of these factors, alone, is dispositive, and, generally, only a few factors demonstrating control is enough to establish an employer-employee relationship. See § 31-274(c) ("the provisions of this chapter shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases"). The primary inquiry, however, is whether there is a right to control the performance of service. See Daw's Critical Care Registry, Inc., supra.

In the instant appeal, the trial court determined, following an exhaustive review, that the factual record establishes a sufficient evidentiary basis to find that service technicians and installers are under the control and direction of Standard Oil. (MOD) at 27-28; Board of Review Decision (March 21, 2012) at 3 (Rec. 834). As Latimer noted: "The determination of the status of an individual as an independent contractor or employee is often difficult

(note, 124 A.L.R. 682) and, in the absence of controlling considerations, is a question of fact. (Citations omitted.)

Id. at 249.

Here, the agency concluded that Standard Oil controlled the workers performance of service.[4] Namely, the Board, in a thorough analysis of the evidence, concluded that the control of the installers and technicians by Standard Oil was manifested in several factual findings set forth in the record. See Board of Review Decision at 5-6, (Rec. 836-837. First, the Board found that the plaintiff exhibited sufficient control with respect to when and how the installers and technicians performed their services. The Board found that the plaintiff made "arrangements directly with the customer regarding all installation and service," scheduled "installation and service appointments with the customers," and should an installer or technician be able to accept an assignment, "the installers and technicians must perform their work within a designated time frame which was set by the appellant and the customer."[5] Board of Review Decision at 11, (Rec. 842). As the Board elaborated in its decision on the Appellant's motion to correct, "[t]he installer and technicians could not set up an appointment directly with a customer," and they "could not choose to perform work for a customer in the morning versus the afternoon, or vice versa." Decision on Motion to Correct Findings, at 6, (Rec. sup. 69).

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[4] "In the case before us, there are factors which tend to show that the appellant had the right to control the installers' and technicians' performance of their services." Board of Review Decision at 4 (Rec. 835).

[5] In Latimer, supra, 216 Conn. at 250, the hearing officer found that the PCAs' hours were established by the plaintiff, and that they "could be directed to perform personal errands for the plaintiff and were required to be cognizant of instructions concerning his care."

The installers/technicians also were "limited to provide the installation/service which Standard has sent them to perform," and they could not perform additional services requested "without permission and/or direction from Standard." Appeals Referee Decision at 3, (Rec. 635). Moreover, the installers/technicians were "required to perform the services personally," they were "not permitted to subcontract," and they were "not allowed to use casual, pick-up or day laborers when providing services in customers' homes." Board of Review Decision at 11, (Rec. 842); see also Latimer, supra, at 250 (finding that the "services to the plaintiff were expected to be rendered personally by the particular PCAs"). Therefore, the record clearly supports the Board's "finding that the work had to be performed within a designated time frame on a particular day, as agreed upon by the appellant and the customer." Decision on Motion to Correct Findings, at 6, (Rec. sup. 69).

The plaintiff contends that the installers/technicians each executed a contractor agreement that provides that the intent of the parties is that the installer/technician is to "remain at all times an independent entity and not an employee of Standard [Oil]." Appellant's Brief, p. 13. The mere fact that the installers/technicians signed such an agreement is not dispositive. As the court opined in Latimer, supra, at 251, "[l]anguage in a contract that characterizes an individual as an independent contractor rather than an employee is not controlling" because "[t]he primary concern is what is done under the

contract and not what it says." (Internal quotation marks omitted.) Therefore, the existence of the contractor agreement in this matter is "of no moment."[6] Id.

The plaintiff also argues that the installers'/technicians' "significant investment" in their materials and tools demonstrates that the plaintiff did not have the requisite *right* to control their work. See Appellant's Brief, p. 8. The record, however, reveals otherwise because the plaintiff provided the installers/technicians with the means to do their work. Namely, the Board found that the plaintiff "determines the equipment to be installed for each project and requires the installer to use the parts supplied by Standard." Appeals Referee Decision, at 3, (Rec. 635).

The record shows that "[o]n occasion, the installer may supplement with its own/other parts as deemed necessary," but that the plaintiff would reimburse or replace such parts. Appeals Referee Decision, at 3, (Rec. 635); Decision on Motion to Correct Findings, at 4, (Rec. sup. 67). Mr. David Cohen, company president, unequivocally testified that "[w]e supply certain parts," and "[t]hey supply certain parts." Decision on Motion to Correct, at 4, (Rec. sup. 67). The Board modified its finding of fact no. 6 as follows to clarify even further who supplies the equipment/parts:

> The boiler installers supply piping, tubing, fittings and cement as necessary for boiler installations, in addition to the parts that the [plaintiff] supplies and requires the installers to use. The [plaintiff] provided nozzles and strainers to individuals who serviced customers who had no heat or needed their furnaces cleaned. The security system installers receive from the [plaintiff] wires ***and***

[6] It should be noted that that the contractor agreements were drafted by the Plaintiff, and that they contained a restrictive covenant, which "prohibits the installers and technicians from soliciting work from or doing business with any of the Appellant's customers for whom they have performed services." Board of Review Decision at 11, (Rec. 842). The use of a "restrictive covenant" by the plaintiff connotes the right to "control" the work of the installers/technicians.

> ***'everything down to the screws,' and they supply no parts at all.***

(Emphasis added.) Decision on Motion to Correct, at 5, (Rec. sup. 68). The Board also clarified its finding of fact no. 22 to address the plaintiff's contention that the Board misconstrued a security system installer's testimony regarding the origins of the equipment used for the installations. Specifically, the board highlighted the following evidence in the record:

> At the referee's October 20, 2010 hearing, Brian Borschet, a security system installer, was asked whether Standard Oil gave him instructions as to what wires to use on certain parts. In response, Borschet testified: "Yeah, that's just the kind of wire they wanted to use for different devices. . . .***they wanted certain wires run right to their keypad and stuff, extra wires . . .certain conductors***." 10/20/10 Referee's Hearing, Tr. At 123. Borschet further testified that ***the appellant told him what wires to run to certain devices; that he was paid for these wires***; and that ***the appellant gave him "everything down to the screw.***" 10/20/10 Referee's Hearing, Tr. At 123-125.

(Emphasis added.) Id., at 2, (Rec. Sup. 65). The defendant submits that this record provides ample evidence to support the Board's findings that the plaintiff supplied the means for the installers/technicians to do their work. Therefore, balancing the "decisive test" as enunciated in Latimer, the defendant submits that the limitations imposed on the installers/technicians by the plaintiff demonstrate that the plaintiff exercised, arguably, "actual" control over who, what and when the work was to be done, which goes even beyond "the employer's possession of the right to control." Latimer, supra, at 251.

In affirming the agency's decision, the trial court clearly acknowledged the agency's task to resolve the critical issue of control and direction. (MOD) at 12. It reviewed the judicial construction of the ABC test, in particular citing and following the holding in Latimer, supra, 216 Conn. at 251-52. See (MOD) at 12-13. Correctly applying the appropriate

standard, the court found, on the significantly detailed factual record, that it was "not convinced" that the Board lacks sufficient evidence to support the latter's conclusion that Standard Oil is an employer covered under the Unemployment Compensation Act. Id. at 28.[7] Therefore, there is no error in the trial court's affirmance of the Board's decision because the court properly found that the record supports the Board's conclusion that the plaintiff did not meet its burden "of showing that the named individuals were free from control and direction in the performance of their services." Board of Review Decision at 6, (Rec. 837).

3. THE TRIAL COURT PROPERLY SUSTAINED THE ADMINISTRATOR'S FINDING UNDER PART B OF THE ABC TEST BECAUSE THE CLAIMANTS NEITHER PERFORMED WORK OUTSIDE THE COURSE OF BUSINESS OR OUTSIDE THE PLACES OF BUSINESS FOR WHICH SERVICES ARE PERFORMED.

The Part B element of the test turns on whether the services of the installers and technicians are performed "outside" the usual course of business. Mattatuck Museum, supra, 238 Conn. at 278-79.

> In sum, prong B requires the finder of fact to determine whether the activity performed is within the "usual course of business" of the specific business at issue. In our view, "usual course of business," as used in § 31-222(a)(1)(B)(ii)(II), means that the enterprise performs the activity on a regular or continuous basis, without regard to the substantiality of the activity in relation to the enterprise's other business activities.

Id. at 280-81.

As the record makes clear, the facts establish that under Part B of the ABC test the services the installers performed were not outside the usual course of the Plaintiff's

[7] Since the Appellant has failed to meet Part A of the test it is unnecessary for the Court to reach Part B. Latimer at 252.

business.[8] Following its analysis of the evidence, briefs and argument, the Board held that the services the installers and service technicians provided were inextricably intertwined and integral to the Plaintiff's business:

> In the case before us, the appellant is an oil company which advertises and sells heating and cooling equipment and security systems. The vast majority of the heating and cooling equipment and security systems sold by the appellant are installed by the installers on behalf of the appellant. The appellant specifically advertises the sale of installed heating and cooling equipment and security systems, and it contracts directly with its customers regarding that installation. The appellant's vice president, David Cohen, testified that the appellant sells security systems and heating and cooling equipment in the normal course of its business, and that it typically sells installation along with the equipment. Cohen testified that only "rarely" will the appellant sell a security system or heating and cooling equipment and not sell the installation. Presumably the marketability of the equipment is enhanced by an installation being part and parcel of any sale. While the appellant has no installers on payroll, it has on occasion used a company employee to install equipment when no installers were available. Moreover, the appellant has employees who clean and service its heating and cooling equipment, in addition to the technicians who are at issue in this case. The weight of the evidence compels our finding that the services were not outside the usual course of the appellant's business.

Board of Review's Decision, supra at 7 (Rec. 838). (Emphasis added.)

Based on the ample factual record, the trial court correctly held that the Board properly determined that Standard Oil failed to meet part B of the ABC test, insofar as the services performed are not outside the usual course of Standard Oil's business. (MOD) at 30-31.

The Plaintiff's reliance on Daw's is misplaced. Daw's is readily distinguishable from the present case. First, the Plaintiff determines what services the installers/technicians will

[8] See (MOD) at 29-35 where the trial court dutifully reviewed the factual record. The trial court bifurcates Part B into two issues: (1) the usual course of business, id. at 30-31,and (2) place of business, id. at 32-35.

perform. Second, while in Daw's the plaintiff's task ended with the provision of nurses, here the Plaintiff's task begins with the work of the installers/technicians. After a unit is installed, the Plaintiff continues to provide a variety of services at the customer's site. Indeed, the present case is more similar to Mattatuck than to Daw's regarding course of business, therefore, the trial court found, the board properly determined that the services provided by the installers/technicians were within the plaintiff's course of business.

Id. at 31.

Moreover, the record supported the factual analysis on the place of business. Critical to this determination, the agency made the following factually based finding pertinent to the situs of Standard's business under Part B, i.e. the customers' homes:

> In the instant case, we find that the installers' and technicians' services were not performed outside of all places of business of the appellant. The appellant contracts directly with its customers to provide installation of its heating and cooling equipment and security systems in the customers' homes, and to continue to service the equipment and monitor the security systems. As in Greatorex, the appellant's customer's homes have, by contract, become places of business of the appellant for purposes of Part B of the ABC test. Similar to the measures in Carpetland, and the caregivers in Home Care Professionals, the installers and technicians represent the appellant's interest when they are in the homes of the appellant's customers, and the appellant profits from the services that are performed in its customers' homes. Unlike the enterprises in Daw's and Alward, the appellant does not merely broker contractor services but, rather, offers installation and servicing of heating and cooling equipment and security systems to the public. Moreover, unlike the enterprise in Benitz, the appellant contracts directly with the customers whose homes are the situs for the installers' and technicians' services.

Board of Review's Decision, supra at 9 (Rec. 839). (Emphasis added.)

The trial court, based on the factual administrative record and case law, agreed.

> Based on the preceding case law, the court finds that the board properly determined that the customers' locations were a place of business of the plaintiff. The plaintiff engages the

> installers/servicers to perform certain tasks as part of a continuing provision of services at the customers' locations. Some of these tasks overlap with those performed by employees. Others are performed predominantly, and possibly exclusively, by putative independent contractors, but nonetheless the tasks are part of ongoing activity at the customer's location.
>
> Based on the foregoing, the court determines that the board had substantial evidence for its findings as to both part A and part B of the ABC test, therefore the installers/technicians are employees of the plaintiff. The appeal is dismissed.

(MOD) at 35. (Emphasis added.)

Here the agency factually found, as affirmed by the trial court, that the customers are recruited and billed by the Plaintiff and enter into contracts for the purchase and installation of the systems with the Plaintiff. Id. This ruling is consistent with Board precedent that the place of business is not only the office, but the individual job sites at which the employer contracts to provide service. See, Feschler (hospital) 995-BR-88 (A-59, 63), JSF Promotions (museum) 9008-BR-00 (A-70, 75), Benitz (customer's home) 9004-BR-10 (A-80. 83-84) and Greatorex (construction site) 1169-BR-88 (A-87, 89).[9] The Plaintiff cannot argue that there is no contract.

Based on the entire record, there was an appropriate evidentiary basis to find an employment relationship and the fact-based inclusion of the installers and technicians for coverage under Part B of the test.[10]

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[9] The Plaintiff is incorrect in representing to the court that the board did not reach the Part B issue in Greatorex. The board in that matter declined to rule on part B because of insufficient evidence regarding the "in the course of" test for Part B, but did in fact rule that the claimant did not perform his services outside all of the places of business because the claimant performed his services at the construction sites secured by the Plaintiff and the job sites by contract became the Plaintiff's places of business.

[10] Plaintiff does not contest the Administrator's finding that it met Part C of the ABC test, i.e. that the claimants are customarily engaged in an independently established trade occupation, profession or business of same nature as that of service performed.

V. CONCLUSION AND STATEMENT OF RELIEF REQUESTED.

Throughout the trial court opinion it is clear that it found an appropriate evidentiary basis to support the agency's findings. Rather than repeat the specific findings, the Administrator simply refers the Court to the detailed administrative record cited by the trial court. See e.g. (MOD) at 21-22, 26-28 (Part A) and 30-35 (Part B).

While the Plaintiff goes to great length to argue what the factual findings should have been, in the final analysis it is the record evidence that must support the agency conclusion. Here, the trial court found that such evidence exists and there was no abuse of agency discretion. (MOD) at 35. As another court stated when confronted with the ABC test:

> "The determination of the status of an individual as an independent contractor is often difficult . . . and, in the absence of controlling considerations, is a question of fact." Robert C. Buell & Co. v. Danaher, 127 Conn. 606, 610, 18 A.2d 697 (1941). "In appeals of this nature the court cannot substitute its discretion for that legally vested in the [Administrator] but determines on the record whether there is a logical and rational basis for the decision of the Commissioner or whether, in the light of the evidence, he has acted illegally or in abuse of his discretion." Taminski v. Administrator, 168 Conn. 324, 326, 362 A.2d 868 (1975). After a thorough review of the record, the court is convinced that there was no abuse of discretion here.

Stone Hill Remodeling v. Administrator, 1991 WL 32698 (Conn. Super 1991) (Greatorex appeal). (Appendix A-92.)

The trial court properly affirmed the agency's decision that the Appellant failed to prove that it met its burden of proof as to Part A and Part B of the ABC test. The record establishes sufficient evidence to find that the installers and technicians are employees and eligible for coverage under the Unemployment Compensation Act. (MOD) at 35.

For the foregoing reasons, the Defendant Administrator, Unemployment Compensation Act, respectfully requests that the decision of the trial court be affirmed and the appeal be dismissed, based on the evidentiary and factual determinations in the record and upon the well settled authority of JSF Promotions, Inc. v. Administrator, supra, 265 Conn. 420; Mattatuck Museum, supra, 238 Conn. 278-279 and Latimer, supra, 216 Conn. 248-250. There was no error by the trial court in affirming the finding of the agency that there is an employment relationship for purposes of the Act.

Respectfully submitted,

DEFENDANT-APPELLEE
ADMINISTRATOR, UNEMPLOYMENT
COMPENSATION ACT

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CERTIFICATION PURSUANT TO PRACTICE BOOK § 62-7

In accordance with Practice Book § 62-7, I hereby certify that the foregoing Brief of Defendant-Appellant conforms to the formatting requirements set forth in Practice Book § 67-2; that the font is Arial size 12; and that a copy of the foregoing Brief of Defendant-Appellant has been served upon the following by first class mail, postage prepaid, this 4th day of March, 2015:

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CERTIFICATION PURSUANT TO PRACTICE BOOK § 67-2(h)

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2(h):

1. The electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

2. The electronically submitted brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited form disclosure by rule, statute, court order or case law.

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CERTIFICATION PURSUANT TO PRACTICE BOOK § 67-2(i)

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2(i):

1. A copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Practice Book § 62-7; and

2. The brief and appendix being filed with the Appellate Clerk are true copies of the brief and appendix that were submitted electronically pursuant to Practice Book § 67-2(g); and

3. The brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

4. The brief complies with all provision of this rule.

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SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF FAIRFIELD
AT BRIDGEPORT

S.C. 19493

STANDARD OIL OF CONNECTICUT, INC.
PLAINTIFF-APPELLANT

V.

ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT
DEFENDANT-APPELLEE

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ADMINISTRATOR

Board Case No.: 9006-BR-11
Referee Case No.: 9019-DD-09

E.R. #: 00-000-00

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Date mailed to interested parties: March 21, 2012

E.R. #: 57-017-95

DECISION OF THE BOARD OF REVIEW

I. CASE HISTORY AND JURISDICTION

By a decision issued on August 6, 2009, the administrator ruled the appellant was engaged in an employer-employee relationship with certain named individuals who provided services as security system installers, heating and cooling equipment installers, and technicians who serviced heating and cooling equipment. On August 26, 2009, the appellant appealed the administrator's decision to the Bridgeport office of the appeals division. The appeals division scheduled hearings of the appeal for August 6, October 20 and October 21, 2010, which the appellant and administrator attended. By a decision issued on August 16, 2011, Principal Appeals Referee Karen D. Schumaker affirmed the administrator's ruling.

The appellant filed a timely appeal to the board of review on August 26, 2011. Acting under authority contained in General Statutes § 31-249, we have reviewed the record in this appeal, including the recording of the referee's hearing.

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II. ISSUE

The referee ruled that the appellant engaged in covered employment certain named individuals who provided services as security system installers, heating and cooling equipment installers, and technicians who serviced heating and cooling equipment.

In support of this appeal from the referee's decision, the appellant contends that the facts as found by the referee are not supported by the record; that the referee disregarded and failed to properly weigh the evidence in the record; and that the referee misinterpreted the relevant law in concluding that the appellant did not satisfy the ABC test. The appellant maintains that the installers and technicians are independent contractors under our unemployment compensation law. Specifically, the appellant contends that it satisfies Part "A" of the ABC test because each of the installers and technicians signed an independent contractor agreement; and the appellant does not provide them with an office, supervise their work or instruct them how to perform their work. The appellant also contends that the installers and technicians set their own schedules and sequence of work; accept the risk of making a profit or loss; are paid by the job; do not receive fringe benefits; provide their own transportation, tools, equipment, and insurance without reimbursement by the appellant; pay for their own training; and may employ their own assistants.

The appellant contends that it satisfies Part "B" of the ABC test because installation and service is not a material part of its business, and because all of the services are performed in customers' homes. The appellant maintains that, under the administrator's and the referee's interpretation of Part B, it would be impossible for the appellant to ever utilize the services of an independent contractor. Finally, the appellant contends that it satisfies Part C because each of the installers and technicians is customarily engaged in an independently established trade, occupation, profession or business of the same nature as the services provided.

The issue before the board is whether the appellant engaged the named individuals in employment within the meaning of the Connecticut Unemployment Compensation Act.

III. PROVISIONS OF LAW

The Connecticut Unemployment Compensation Act defines employment in General Statutes §§ 31-222(a)(1)(A) and 31-222(a)(1)(B). The ABC test contained in General Statutes § 31-222(a)(B)(ii), which is utilized to ascertain whether an employer-employee relationship exists under the Act, provides that any service provided by an individual is considered employment unless and until the recipient of the service sustains the burden of proving that:

> (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed....

IV. FINDINGS OF FACT AND CONCLUSION OF LAW

There is a presumption under the Connecticut Unemployment Compensation Act that service is employment unless and until the appellant can establish that the service comes within a specific exemption to the Act or unless and until the appellant can establish, irrespective of whether the common law relationship of master and servant exists, that all prongs of the so called "ABC" test of General Statutes § 31-222(a)(1)(B)(ii) are satisfied. "Because the prongs of the ABC test contained in §§ 31-222(a)(1)(B)(ii)(I), 31-222(a)(1)(B)(ii)(II) and 31-222(a)(1)(B)(ii)(III) are conjunctive, the inability of the recipient of the service to satisfy any single one of those prongs necessarily results in a conclusion that an employer-employee relationship exists for purposes of the Connecticut Unemployment Compensation Act." *Latimer v. Administrator*, 216 Conn. 237, 252 (1990). In addition, General Statutes § 31-274(c) provides that the provisions of the chapter shall be construed, interpreted and administered in such a manner as to presume coverage, eligibility and nondisqualification in doubtful cases.

The three-part ABC test, therefore, goes beyond the simple master-servant or control test found in Part A of the test. It narrows the exception from covered employment to workers who not only are free from control, but who are also customarily engaged in an independently established enterprise which would withstand the loss of the relationship with the appellant and whose services are either outside the usual course or place of the business for which the service is performed. See *Daw's Critical Care Registry v. Department of Labor*, 42 Conn. Sup. 376, 622 A.2d 622 (1992), aff'd *Daw's Critical Care Registry v. Department of Labor*, 225 Conn. 99, 622 A.2d 518 (1993)(per curiam). We are required by the Connecticut Unemployment Compensation Act to look beyond an agreement or form to the substance of the relationship to ascertain whether there is an employer-employee relationship as defined by the Act. See *Taylor Graves v. Administrator*, 15 Conn. Sup. 399, 401 (1948); *Brown v. The Cleaning Crew*, Board Case No. 166-BR-89 (3/23/89).

The first part of the ABC test, General Statutes § 31-222(a)(1)(B)(ii)(I), requires the appellant to establish that the claimant is free from control or direction in connection with the performance of his or her services, both under the contract for the performance of service and in fact. This is essentially the same as the common law independent contractor test. *F.A.S. International, Inc. v. Reilly*, 179 Conn. 507, 511-512, 427 A.2d 392 (1980); *Daw's Critical Care Registry, Inc.*, Conn. Sup.at 391. The critical factor is who has the right to direct and control what shall be done and when and how it shall be done. *Thompson v. Twiss*, 90 Conn. 444, 447 (1916); *Latimer* 216 Conn. at 248. An independent contractor is "one who, exercising an independent employment, contracts to do a piece of work according to his or her own methods and without being subject to the control of his or her employer, except as to the result of his or her work." *Darling v. Barrone Bros., Inc.*, 162 Conn. 187, 195, 292 A.2d 912 (1972), quoting *Alexander v. R.A. Sherman's Sons Co.*, 86 Conn. 292, 297, 85 A. 514 (1912).

Among the factors we examine to determine if there is a right to control the performance of the service are the retention of the right to discharge without liability; the right to general control of the day-to-day activities, including how the hours when the individuals are to work are established, who furnishes materials and tools necessary to perform the service, whether the individual can subcontract the work, the manner of remuneration; and the agreement between the parties. See, e.g., *Daw's Critical Care Registry, Inc.*, 42 Conn. Sup. At 393-395. None of these factors, in and of itself, is dispositive; the primary inquiry is whether there is a right to control the performance of the service.

In the case before us, there are factors which tend to show that the appellant had the right to control the installers' and technicians' performance of their services. The appellant is an oil company which advertises and sells heating and cooling equipment and security systems. The vast majority of the heating and cooling equipment and security systems sold by the appellant are installed by the installers on behalf of the appellant. The appellant specifically advertises the sale of *installed* heating and cooling equipment and security systems, and it contracts directly with its customers regarding that installation. After installation, the appellant services the heating and cooling equipment and provides monitoring of the security systems.

The appellant has employees on its payroll who service heating and cooling equipment, in addition to retaining the named technicians in this case to perform similar work. The appellant makes arrangements directly with the customer regarding all installation and service. It schedules installation and service appointments with the customers, and then finds an installer or technician who can take the assignment. If they accept an assignment from the appellant, the appellant requires the installers and technicians to perform their work within a designated time frame set by the appellant and the customer. The installers and technicians are required to provide the services personally. The appellant does not permit them to subcontract, although they may hire assistants to help them perform the work. The appellant also does not allow the installers and technicians to use casual, pick-up or day laborers when providing services in customers' homes.

Five of the installers/technicians, Brian Borchert, Walter Camp, Edward Chickos, Jr., William Parks and Gary Vannart, responded "yes" to a question on the administrator's questionnaire asking if the appellant has the right to direct how they perform their work. None of the installers or technicians responded "no" to that question. While Borchert and Chickos subsequently testified that the appellant does not have the right to direct how they perform their work, neither provided a credible explanation for his prior inconsistent statement. Borchert, who is a security system installer, testified that the appellant has instructed him to run an extra wire through its keypads and to use a certain type of conductor. Moreover, the installers can only install the equipment which the appellant provides. The appellant also provides the technicians with nozzles, strainers, and filters for cleaning oil burners.

The installers and technicians cannot accept different or additional work from a customer without the appellant's authorization. In the event that a customer requests changed or additional services, the installers and technicians are instructed to direct the customer to contact the appellant directly. All billing and payment occurs through the appellant. If a customer complains about an installation or service during the warranty period set forth in the appellant's contract with the installer/technician, the appellant has the right to send the installer/technician back to the customer site to fix the problem or require the installer/technician to pay for the repair. The installers and technicians are paid a set rate per piece of work. They cannot negotiate the pay rate, the appellant establishes. The appellant requires the installers and technicians to submit their invoices for payment no later than Friday of the week in which they satisfactorily complete their assignments. The appellant encourages the installers and technicians to wear apparel that bears the appellant's name, and it requires the security system installers to display photo badges which identify them as subcontractors of the appellant.

The appellant can terminate its contract with an installer or technician without liability at any time, for any reason or no reason. While the appellant maintains that it cannot terminate an installer or technician who is in the middle of an assignment, there is no evidence that the appellant modified its contracts, which contain no limitation on the appellant's right to terminate an installer or technician.

The right to terminate without liability is inconsistent with the concept of an independent contractor relationship, and is "a strong indication" of an employer-employee relationship. *Latimer v. Administrator*, 216 Conn. 237, 249 (1990). In addition, the appellant's contracts contain a restrictive covenant which prohibits the installers and technicians from soliciting work from or doing business with any of the appellant's customers for whom they have performed work.[1] While the existence of a restrictive covenant is not determinative, it tends to show a degree of control. *Dandurand-Smith v. Medical Typing Services*, Board Case No. 9006-BR-09 (10/30/09); *Brown v. Gamache Painting*, Board Case No. 9004-BR-00 (5/31/00).

On the other hand, certain factors exist which would tend to show that the appellant did not exercise control and direction. For example, the appellant required each of the installers and technicians to sign an independent contractor agreement, which states that they shall at all times exercise independent judgment and control in the execution of any work, job or project they accept. They are free to accept or reject any assignment which is offered to them, and can determine which days they will perform services for the appellant. The appellant does not supervise the installers or technicians when they are performing their work, and it has no representatives on site at the time that the services are performed. There is no evidence that the appellant checks the installers' or technicians' work after it has been completed. The installers and technicians are licensed or certified to perform their services in accordance with state law. The appellant does not provide the installers and technicians with an employee handbook, and it does not pay for their training or require any specific type of training on its products. The installers and technicians may hire employees to assist them, and they may supervise their employees as they see fit. The installers and technicians can realize a profit or a loss. They provide their own tools, transportation, and insurance.

The appellant contends that it satisfies Part A because its relationship with the installers/technicians is similar to the relationships at issue in *Daw's Critical Care Registry, Inc.*, supra, and *Alward v. At Your Service*, Board Case No. 9008-BR-93 (6/20/95). In *Daw's*, the enterprise was a nursing registry which brokered to match nurses with healthcare providers that needed nursing services. The registry did not provide nursing services itself, but merely served as a conduit for payment from the healthcare providers to the nurses. In *Alward*, the enterprise served its customers by arranging for bartenders and other personnel for parties. While the claimant in *Alward* was unable to negotiate her pay rate, she could receive tips and arrange privately with the customers to perform additional work. We noted that the enterprise in *Alward* "offers very short term assignments, and any problems arising between a client and the service provider must be worked out between those two parties." By contrast, in the instant case, the installers and technicians perform services which are advertised and sold by the appellant, and the appellant arranges all of the details, such as timing and payment, directly with its customers. The appellant has long-term arrangements to serve its customers, including the servicing of its heating and cooling equipment and the monitoring of its security systems after installation. Any problems arising between a customer and the installer/technician must be referred to the appellant.

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[1]Two security installers, Marcel Aardewerk and Mike Poirier, were able to negotiate modifications to the restrictive covenants contained in their agreements with the appellant. Nevertheless, the modified restrictive covenants still restrict these installers' ability to perform services for the appellant's customers independent of the appellant.

The appellant also cites cases from other jurisdictions in which courts found that a variety of installers and technicians were independent contractors. Both the board and the courts have looked to other jurisdictions for guidance in interpreting the ABC test. See *Daw's Critical Care Registry, Inc.*, supra; *Tracy v. The Norwich Bulletin*, Board Case No. 9030-BR-93 (12/12/95). However, we are not bound by decisions from other jurisdictions, particularly since quite often the statutes being construed are quite different from Connecticut's ABC test.[2]

While three of the appellant's cases involved other states' applications of either the ABC test or tests similar to the ABC test, the facts of each of those cases make them inapposite to the case before us. The court's opinion in *North American Builders, Inc. v. Unemployment Compensation Division*, 453 P.2d 142 (Utah 1969), provides little analysis to support its holding that siding installers were free from direction and control. In *Mission Insurance Company v. Workers' Compensation Appeals Board*, 176 cal. Rptr. 439 (Cal. Dist. Ct. App. 1981), the principal could only terminate an installer on thirty days' notice, unless the installers' conduct justified immediate termination. Moreover, the installers were not required to provide the services personally, unlike the installers and technicians in the instant case. Finally, in *Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor*, 593 A.2d 1177, 1190 (N.J. 1991), there were weaker indicia of direction and control than in the instant case. The carpet installers in the *Carpet Remnant Warehouse* case could negotiate their rate of pay with the principal, and could accept additional work from the principal's customers and be paid directly for that work. Based on our review of the evidence in the instant case, we find that the appellant has not met its burden of showing that the named individuals were free from control and direction in the performance of their services. Accordingly, we conclude that the appellant does not satisfy Part A of the ABC test.

Part B of the ABC test requires that the claimant's services either be performed outside the course of the business for which the service is performed or outside all the places of business of the enterprise for which the service is performed. This subtest is in the alternative, and the appellant need only establish that the service is outside either the course or the place of its business. The Connecticut Supreme Court has interpreted this provision to cover the specific business activities engaged in by the enterprise, rather than the type of business in general. *Mattatuck Museum-Museum Historical Society v. Administrator*, 238 Conn. 273 (1996). The Supreme Court further ruled that the "usual course" requirement means that the activity must be performed by the enterprise on a regular or continuous basis, without regard to the substantiality of the activity in relation to the enterprise's other business activities. In *Mattatuck*, the Court held that although the plaintiff museum operated largely as an exhibition hall for regional historic artifacts and art, it offered art courses on a regular and

[2]Three of the cases cited by the appellant involve the federal Fair Labor Standards Act, which applies an "economic realities" test instead of the ABC test. See *Freund v. Hi-Tech Satellite, Inc.*, 185 Fed. Appx. 782 (11th Cir. 2006); *Herman v. Mid-Atlantic Installation Services*, Inc., 164 F. Supp. 2d 667 (D. Md. 2000); *Dole v. Amerilink Corp.*, 729 F. Supp. 73 (E.D. Mo. 1990). Two of the cases involve the National Labor Relations Act, which applies federal common law to determine whether an individual is an independent contractor. See *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492 (D.C. Cir. 2009); *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884 (1998). Another case, which involved Florida unemployment compensation law, applied a common law test instead of the ABC test. *T & T Communications, Inc. v. State Dep't of Labor & Employment Sec.*, 460 So. 2d 996 (Fla. Dist. Ct. App. 1984).

continuous basis and held itself out to the public as offering these courses. Therefore, the Court concluded that the plaintiff failed to satisfy the second prong of the ABC test in retaining the claimant as an art instructor in its program.[3]

In the case before us, the appellant is an oil company which advertises and sells heating and cooling equipment and security systems. The vast majority of the heating and cooling equipment and security systems sold by the appellant are installed by the installers on behalf of the appellant. The appellant specifically advertises the sale of *installed* heating and cooling equipment and security systems, and it contracts directly with its customers regarding that installation. The appellant's vice president, David Cohen, testified that the appellant sells security systems and heating and cooling equipment in the normal course of its business, and that it typically sells installation along with the equipment. Cohen testified that only "rarely" will the appellant sell a security system or heating and cooling equipment and not sell the installation. Presumably the marketability of the equipment is enhanced by an installation being part and parcel of any sale. While the appellant has no installers on payroll, it has on occasion used a company employee to install equipment when no installers were available. Moreover, the appellant has employees who clean and service its heating and cooling equipment, in addition to the technicians who are at issue in this case. The weight of the evidence compels our finding that the services were not outside the usual course of the appellant's business.

The appellant also contends that, because the services were performed within customers' homes, they were performed outside of the appellant's places of business. The board has held that the place of business is not only the office, but the individual job sites at which the appellant contracts to provide service. See *Greatorex v. Stone Hill Remodeling*, Board Case No. 1169-BR-88 (1/9/88), aff'd sub nom. *Stone Hill Remodeling v. Administrator*, Superior Court, Judicial District of Waterbury, Docket No. 089398 (February 21, 1991); *Feschler v. Hartford Dialysis*, Board Case No. 995-BR-88 (12/27/88).

In *Greatorex*, the board held that a home remodeling general contractor did not satisfy part B because the claimant performed his services at the construction sites secured by the general contractor, "and these job sites had by contract become the [general contractor's] place of business." More recently, in a case involving individuals selling vacuum cleaners, the board found that the homes of customers and potential customers were "places of business" for purposes of Part B. See *Pettway v. SZ Enterprises, Inc.*, Board Case No. 9006-BR-10 (12/23/11). Our precedential decisions in *Greatorex* and *Pettway* are consistent with courts in other jurisdictions which have held that customer homes may become "places of business" under the ABC test when an individual represents the employer's interest while on the premises. See *Carpetland U.S.A., Inc. v. Illinois Dep't of Employment Sec.*, 776 N.E. 2d 166, 189 (Ill. 2002)(holding that customer homes were "places of business" because

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[3]In *Tiedemann v. New Haven Country Club Corporation*, Board Case No. 1045-BR-97 (8/21/97), the appellee argued that its course of business was providing food, beverages and social and golf activities related to the provision of food and beverages. The board held that the appellee clearly offered golf itself as an activity in its usual course of business, because its insignia featured golf equipment and the placemats utilized in its restaurant were maps of the golf course. The board presumed that the appellee's members joined for the purpose of playing golf. Therefore, the services the claimant provided relative to the golf carts and caddies were inextricably intertwined with and integral to the appellee's provision of golf as an activity in the usual course of its business.

measurers represented company's interest while in those homes); see also *Home Care Professionals of Arkansas, Inc. v. Williams*, 235 S.W.3d 536, 541 (Ark. App. 2006)(holding that client homes were "places of business" because home care company profited from services that caregivers provided there).

By contrast, the courts and the board have held that services were performed outside of the enterprises' places of business when the enterprise merely brokered contractor services and did not hold itself out to the public as providing those services. See *Daw's Critical Care Registry, Inc.*, supra (holding that customers' sites were not "places of business" of nursing registry which merely furnished nurses to healthcare providers and did not itself offer nursing services); *Alward*, supra (board held that the sites of customers' parties were not "places of business" of the enterprise, which offered only party planning and coordinating and conducted those activities from its owner's home). Similarly, when satellite dish installations were performed in the homes of the enterprise's contractor's customers, and the enterprise did not itself have a contract with those customers, the board held that the services were performed outside of the enterprise's places of business. See *Benitz v. D & K Communications, Inc.*, Board Case No. 9004-BR-10 (10/7/10).

In the instant case, we find that the installers' and technicians' services were not performed outside of all places of business of the appellant. The appellant contracts directly with its customers to provide installation of its heating and cooling equipment and security systems in the customers' homes, and to continue to service the equipment and monitor the security systems. As in *Greatorex*, the appellant's customer's homes have, by contract, become places of business of the appellant for purposes of Part B of the ABC test. Similar to the measurers in *Carpetland* and the caregivers in *Home Care Professionals*, the installers and technicians represent the appellant's interest when they are in the homes of the appellant's customers, and the appellant profits from the services that are performed in its customers' homes. Unlike the enterprises in *Daw's* and *Alward*, the appellant does not merely broker contractor services but, rather, offers installation and servicing of heating and cooling equipment and security systems to the public. Moreover, unlike the enterprise in *Benitz*, the appellant contracts directly with the customers whose homes are the situs for the installers' and technicians' services.

The appellant, citing *Carpet Remnant Warehouse*, contends that it would be impossible for the appellant to ever utilize the services of an independent contractor under the administrator's and the referee's interpretation of Part B.[4] In *Carpet Remnant Warehouse*, the New Jersey Supreme Court construed the phrase "places of business" to refer "only to those locations where the enterprise has

[4]Throughout these proceedings, the appellant has contended repeatedly that the administrator's and the referee's interpretation of the ABC test would render it "impossible" for an enterprise to ever utilize an independent contractor. However, the record reveals that the administrator agreed with the appellant's classification of certain individuals as independent contractors. Moreover, we note that the board has found that individuals were properly classified as independent contractors in a number of cases: See, e.g., *Administrator v. SJS Corporation*, Board Case No. 9001-BR-07 (3/4/09) (estate managers found to be independent contractors); *Administrator v. JSF Promotions*, Board Case No. 9008-BR-00 (7/10/01) (product demonstrators found to be independent contractors); *Administrator v. Auto Lock Unlimited, Inc.*, Board Case No. 9017-BR-95 (9/20/96) (automobile repossessors found to be independent contractors).

a physical plant or conducts an integral part of its business." *Carpet Remnant Warehouse, Inc.*, 593 A.2d at 1190. Applying its construction to the facts which were before it, the court held that customer homes in which carpet installers performed their services were not places of business of the enterprise, because the enterprise did not conduct an integral part of its business in customers' homes.

Even if we were to adopt the New Jersey court's construction of its state's ABC test, we nonetheless would find that the services at issue in the instant case were performed within the appellant's places of business. In *Carpet Remnant Warehouse*, the enterprise sold carpeting, and it brokered installation services for customers who desired them. The customers were not required to buy installation services from the enterprise. Moreover, there was no evidence that the enterprise had an ongoing relationship with a customer once the carpeting was installed satisfactorily. By contrast, in the instant case, the appellant advertises and sells *installed* heating and cooling equipment and security systems. It rarely sells equipment without also selling the installation of that equipment. Moreover, the appellant has long-term contracts with its customers to service its heating and cooling equipment and monitor its security systems. Therefore, unlike the enterprise in *Carpet Remnant Warehouse*, the appellant in the instant case conducts an integral part of its business in customers' homes. Accordingly, we conclude that the appellant does not satisfy Part B of the ABC test.

Part C of the ABC test requires the appellant to establish that the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that of the service performed. The adverb "independently" modifies the word "established" and has been construed to mean that the trade, occupation, profession or business was established independent of the contracting entity. See *JSF v. Administrator*, 265 Conn. 413, 828 A.2d 609 (2003). Moreover, an activity in which the individual "is customarily engaged" requires that the individual "must be engaged in such independently established activity at the time of rendering the service which is the subject of inquiry." *Daw's Critical Care Registry, Inc. v. Dep't of Labor*, 42 Conn. Sup. at 407. An established business or profession is one that is permanent, stable, fixed or lasting, and the enterprise must exist separate and apart from the relationship with the contracting entity and survive the termination of that relationship. *Id.* at 408, citing *F.A.S. International, Inc.*, supra. The statute does not require that an individual merely be able to engage in activity independent of that of the employer, but that the individual must be customarily engaged and holding himself or herself out to the public as being engaged in the independent activity at the time of rendering the service. *Feschler*, supra.

Among the factors we examine under Part C of the "ABC" test are the existence of business cards or letterhead, advertising one's services, having a place of business, having an established clientele, having a contractor's or business license or special skills acquired through an apprenticeship period, and having a substantial investment in tools to perform the service. See *New Sleep, Inc. v. Department of Employment Security*, 703 P.2d 289, 291 (Utah, 1985). Other relevant factors include the investment of risk capital, the employment of others, the performance of services for more than one person, the separation of the individual's business establishment from the premises of the person for whom the services are performed, the performance of services under the individual's name rather than the name of the person for whom the services are performed, the offering of services to the public or customers, whether the performance of services affects the good will of the individual rather than that of the person for whom the services are performed, and whether there is a saleable, going business concern. See *Tracy v. The Norwich Bulletin*, Board Case No. 9030-BR-93 (12/12/95); *Dionne v. Nelson Freightways*, Board Case No. 691-BR-89 (10/6/89).

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In the case before us, the referee found that none of the installers or technicians is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that of the service performed. However, the record reveals that each of the installers and technicians is licensed or certified to perform the services as required by state law. Moreover, the employer has produced evidence that each of the installers and technicians has an independent business which provides the same types of services that he performs on behalf of the appellant. Many of the installers and technicians have business cards and advertise their businesses. The heating and cooling equipment installers are required to have box trucks which are capable of transporting large equipment, such as boilers and oil burners. In addition, there is evidence that many of the installers and technicians earned at least some of their income from other sources than the appellant during the years inquestion.

We find that the weight of the evidence establishes that most, if not all, of the installers and technicians were customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed for the appellant. Nonetheless, the appellant has failed to establish that the named individuals were free from the appellant's control and direction with the performance of their services, or that they performed services outside the course or places of the employer's business. Since the appellant has not satisfied Parts A and B of the ABC test, the services provided by the named individuals are considered covered employment for purposes of the Connecticut Unemployment Compensation Act. In so ruling, we adopt the referee's findings of fact as our own, except that we modify the referee's finding of fact no. 1 as follows:

> 1. The appellant is primarily in the business of home heating oil delivery. It also advertises and sells heating and cooling equipment, and the installation, maintenance and repair of such equipment. For example, the appellant advertises its twenty-four-hour or 'no heat' call service. In addition, the appellant advertises and sells home security alarm systems, and the installation, maintenance, and monitoring of such systems. The appellant specifically advertises the sale of *installed* heating and cooling equipment and security systems, and it contracts directly with its customers regarding that installation.

We add the following sentences to the referee's finding of fact no. 3: "The vast majority of the heating and cooling equipment and security systems sold by the appellant are installed by the installers on behalf of the appellant. After installation, the appellant has long-term arrangements with its customers to service the heating and cooling equipment and to provide monitoring of the security systems. Only rarely will the appellant service equipment or systems which were not installed by one of the installers on behalf of the appellant." We add the following sentence to the referee's finding of fact no. 4: "The installers and technicians are licensed or certified to perform their services in accordance with state law." We add the following sentence to the referee's finding of fact no. 6: "The installers and technicians also provide and pay for their own transportation without reimbursement by the appellant." We modify the referee's finding of fact no. 7 as follows:

> 7. The installers and technicians are free to accept or reject any assignment which is offered to them, and can determine which days they will perform services for the appellant.

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We substitute the following for the second sentence of the referee's finding of fact no. 9: "The appellant requires the security system installers to display photo badges which identify them as subcontractors of the appellant." We also modify the referee's findings of fact nos. 11, 12 and 13 as follows:

> 11. The installers and technicians are required to provide the services personally. They are not permitted to subcontract, although they may hire assistants to help them perform the work and may supervise their employees as they see fit. The installers and technicians are not allowed to use casual, pick-up or day laborers when providing services in customers' homes.
>
> 12. Each of the installers and technicians has an independent business which provides the same types of services that he performs on behalf of the appellant. Many of the installers and technicians have business cards and advertise their businesses. The heating and cooling equipment installers are required to have box trucks which are capable of transporting large equipment, such as boilers and oil burners. In addition, many of the installers and technicians earned at least some of their income from sources other than the appellant, during the years in question.
>
> 13. The appellant makes arrangements directly with the customer regarding all installation and service. It schedules installation and service appointments with the customers, and then finds an installer or technician who can take the assignment. If they accept an assignment from the appellant, the installers and technicians must perform their work within a designated time frame which was set by the appellant and the customer.

We add the following sentence to the referee's finding of fact no. 14: "The agreements state that the installers/technicians shall at all times exercise independent judgment and control in the execution of any work, job or project they accept." We modify the referee's findings of fact no. 15 as follows:

> 15. The installers and technicians are paid a set rate per piece of work. They cannot negotiate the pay rate, which is established by the appellant. The appellant requires the installers and technicians to submit their invoices for payment no later than Friday of the week in which they satisfactorily complete their assignments.

Finally, we add the following findings of fact:

> 19. The installers' and technicians' contracts state that either party may terminate the contract at any time without liability. The contract provides that sums due up to that point will be paid, but it does not otherwise restrict the parties' ability to terminate the contract immediately.
>
> 20. The contracts contain a restrictive covenant which prohibits the installers and technicians from soliciting work from or doing business with any of the appellant's customers for whom they have performed services.

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21. Five of the installers/technicians, Brian Borchert, Walter Camp, Edward Chickos, Jr., William Parks and Gary Vannart, responded 'yes' to a question on the administrator's questionnaire asking if the appellant has the right to direct how they perform their work. None of the installers or technicians responded 'no' to that question.

22. The appellant has instructed the security installers to run an extra wire through its keypads and to use a certain type of conductor. Moreover, the installers can only install the equipment which has been provided by the appellant. The appellant provides the technicians with nozzles, strainers, and filters for cleaning oil burners.

23. Any problems arising between a customer and the installer/technician must be referred to the appellant. If a customer complains about an installation or service during the warranty period set forth in the appellant's contract with the installer/technician, the appellant has the right to send the installer/technician back to the customer site to fix the problem or require the installer/technician to pay for the repair.

24. The appellant does not provide the installers and technicians with an employee handbook, and it does not pay for their training or require any specific type of training on its products.

25. The installers and technicians can realize a profit or a loss from their provision of services to the appellant.

26. While the appellant has no installers on payroll, it has on occasion used a company employee to install equipment when no installers were available. The appellant has employees who clean and service its heating and cooling equipment, in addition to the technicians who are at issue in this case.

27. In his payroll audit report dated July 23, 2009, the administrator agreed with the appellant's classification of certain individuals as independent contractors.

V. DISPOSITION AND ORDER

The referee's decision is **affirmed**, as modified, and the appeal is **dismissed**. The appellant engaged the named individuals in covered employment under Connecticut's Unemployment Compensation Act.

BOARD OF REVIEW

Lynne M. Knox, Chair,
ES Board of Review

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In this decision, Board Member Elizabeth S. Wagner and Alternate Board Member Robert F. Harlan concur.

LMK:SPR:mle

IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY APRIL 20, 2012. SEE LAST PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL RIGHTS.

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COPIES OF THIS DECISION PROVIDED TO:

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NOTICE OF APPEAL RIGHTS

This decision shall become final on the thirty-first (31st) calendar day after the date of mailing unless, before that date, a party appeals this decision to the Superior Court or moves the Board to reopen, vacate, set aside or modify the decision. The appeal or motion may be mailed or faxed to the office of the Employment Security Board of Review at the address or fax number listed in the heading of this decision. The appeal or motion may also be filed in person at any Connecticut Works office for forwarding to the Board, or by Internet at www.ctboard.org.

PLEASE NOTE: To be timely filed, the appeal or motion must be actually received at any such office no later than the thirtieth (30th) calendar day after the date of mailing of this decision or, if filed by mail, must bear a legible United States Postal Service postmark indicating that it was entrusted to the Postal Service within such thirty-day period. **The last day for filing an appeal or motion is listed at the end of the Board's decision.** Postmarks attributable to private postage meters are not acceptable. You may also use one of the private delivery services approved by the IRS: Airborne Express, DHL Worldwide Express, Federal Express, or United Parcel Service. If filed by fax or Internet, the appeal must be received by 11:59 p.m. on the thirtieth day. Neither the Superior Court nor the Board can entertain an untimely appeal or motion unless the appealing party can show good cause for failing to file the appeal or motion on time. Therefore, if your appeal or motion is late, you should indicate why.

Any appeal or motion should list the following identifying information contained on this decision: the case number; the claimant's name, address and social security number; and the employer's name, address and registration number.

A motion to reopen this decision should be specifically titled as such. The original copy of the motion should be filed with the Board. A copy of each motion should also be delivered or mailed to each other party, including the Administrator, and the attorney or authorized agent of record of such party, no later than the date that the motion is filed with the Board. The Administrator's copy of the motion should be sent to: Administrator's Appeals Representative, Office of Program Policy, Connecticut Labor Department, 200 Folly Brook Boulevard, Wethersfield, CT 06109.

An appeal to Superior Court should be titled "Appeal to Superior Court" and should state the grounds on which Superior Court review is sought. Appeals to Superior Court must be filed with the Board so the Board can certify the record to the Court. **Appeals must NOT be sent directly to any Superior Court.** See General Statutes § 31-249b for information concerning appeals to the Superior Court.

If a party who files an appeal to the Superior Court wishes to dispute the Board's findings of fact, it has to file a Motion to Correct Findings. Procedures for filing such a motion are set forth in Chapter 22 of the Connecticut Practice Book.

NOTIFICACION DE DERECHOS DE APELACION

Esta decisión se considerará final a los treinta y ún (31) día de calendario después de la fecha de envío a menos que antes de esa fecha, alguna de las partes apele esta decisión a la Corte Superior o conduzca a la Junta de Revisión a reabrir, anular, ignorar o modificar la decisión. La apelación o moción puede enviarse por correo o por medio del fax a la oficina de Employment Security Board of Review a la dirección o número de fax que aparecen en el encabezamiento de esta decisión. La apelación o moción también puede ser presentada en persona en cualquiera de las oficinas de Connecticut Works para ser enviada a la Junta; o se puede hacer por el Internet a: www.ctboard.org.

POR FAVOR NOTE: Para que su apelación o moción sea considerada, esta deberá ser recibida en cualquiera de las oficinas no más tarde del trigésimo (30) día de calendario después de la fecha de envío de la decisión, o si es enviada por correo deberá tener un matasello legible del Servicio Postal de los Estados Unidos indicando que fue colocada en el correo dentro de este período. **El último día para apelar se indica al final de la decisión de la Junta de Revisión.** No se aceptarán matasellos que pertenezcan a metros postales privados. Usted puede utilizar uno de los servicios de correo privado aprobados por el IRS: Airborne Express, DHL Worldwide Express, Federal Express o United Parcel Service Si apela por fax o Internet, la apelación debe recibirse en o antes de las 11:59 p.m. del trigésimo día (30). La Corte Superior ni la Junta de Revisión pueden considerar una apelación o moción tardía a menos que el apelante demuestre justa causa por su demora. Por lo tanto, si su apelación o moción es tardía, usted deberá indicar la razón por la demora.

Toda apelación o moción deberá incluir la siguiente información contenida en esta decisión: número del caso; nombre del reclamante, dirección y número de seguro social; el nombre del patrono, dirección y número de registración.

Una moción para reabrir esta decisión debe llevar ese título en específico. La moción original debe registrarse en la Junta de Revisión. Debe enviar copia de la moción a todas las partes incluyendo al Administrador, abogado o agente autorizado de cada una de las partes no más tardar a la fecha que la moción se registró ante la Junta. La copia de la moción para el Administrador deberá ser enviada a la siguiente dirección: Administrator's Appeals Representative, Office of Program Policy, Connecticut Labor Department, Employment Security Division, 200 Folly Brook Boulevard, Wethersfield, CT 06109.

Una apelación a la Corte Superior llevará el título "Apelación a la Corte Superior" y deberá indicar la razón por la cual se le pide a la Corte Superior una revisión. Las apelaciones a la Corte Superior deben hacerse en la Junta de Revisión para que la Junta pueda certificar el expediente y enviarlo a la Corte. Superior. **Las apelaciones NO DEBEN enviarse directamente a ninguna Corte Superior.** Vea los Estatutos Generales § 31-249b para información con respecto a apelaciones a la Corte Superior

Si la parte que registra la apelación a la Corte Superior desea disputar la conclusion de los hechos de la Junta, tiene que registrar una moción para corregir los hechos. Procedimientos para registrar tal moción estan expuestos en el Capítulo 22 del Libro de Práctica de Connecticut.

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STATE OF CONNECTICUT
Department of Labor
EMPLOYMENT SECURITY BOARD OF REVIEW
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STANDARD OIL OF CONNECTICUT, INC.
299 Bishop Avenue
P.O. Box 4005
Bridgeport, CT 06607

DOCKET NO. FBT-CV-12-5029769
CASE NO. 9006-BR-11-9019-DD-09

v.

ADMINISTRATOR,
UNEMPLOYMENT COMPENSATION ACT

Date this decision
mailed: March 4, 2013

IMPORTANTE
TENGA ESTO TRADUCIDO INMEDIATAMENTE

DECISION ON MOTION TO CORRECT FINDINGS

On May 2, 2012, the Board of Review certified the record of this case to the Superior Court. Pursuant to Practice Book § 22-4, on August 30, 2012, the appellant filed a motion to correct the findings contained in the board's decision of March 21, 2012.[1] On September 6, 2012, the board gave

[1]The board granted the appellant's motion for extension to file motion to correct findings on May 18, 2012.

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notice to the adverse parties of the filing of the motion and their right to file objections.

The board, having reviewed the appellant's motion, hereby rules as follows:

1. The appellant requests that the board delete its finding of fact no. 19, stating that either party may terminate the contract at any time without liability. The appellant also requests that the board delete the articulation and discussion of this finding in the analysis portion of the board's decision. The appellant maintains that the parties stipulated at the referee's hearing that the right to fire is not relevant in this case and would not be considered in making a determination.

The appellant requests that the board substitute its finding of fact no. 19 with a finding that the parties stipulated that section A-19 in the contract, Right to Fire, would not be a factor in the adjudication of this case. The appellant's request to substitute this finding is **granted**.

We note, however, that substituting this finding does not alter our determination in this case. As we stated in our March 21, 2012 decision, we consider a number of factors in determining whether there is a right to control the performance of the service and none of the factors is, in and of itself, dispositive. See *Daw's Critical Care Registry, Inc.*, 42 Conn. Sup. 376, 393-5, 622 A.2d 622 (1992), aff'd *Daw's Critical Care Registry, Inc*, 225 Conn. 99, 622 A. 2d. 518 (1993) (per curiam).

2. The appellant requests that the board delete the first sentence of its finding of fact no. 22, stating that the appellant instructed the security installers to run an extra wire through its keypads and to use a certain type of conductor. The appellant maintains that this finding is unsupported by the evidence in the record and is based upon impermissible and unreasonable factual inferences. The appellant maintains that the board's finding misconstrues Brian Borchert's testimony, and requests that the board delete its reference to that testimony in the analysis portion of its decision.

The appellant requests that the board substitute finding of fact no. 22 with a finding stating that the appellant provides security installers with the alarm system components, including the control panel and wiring for these components and instructs security installers that they may not substitute a different control panel or type of wire while installing the system. The appellant also seeks a finding that Borchert provided testimony supporting this substituted finding.

The appellant's request is **denied**.

At the referee's October 20, 2010 hearing, Brian Borschet, a security system installer, was asked whether Standard Oil gave him instructions as to what wires to use on certain parts. In response, Borschet testified: "Yeah, that's just the kind of wire they wanted to use for different devices....they wanted certain wires run right to their keypad and stuff, extra wires ...certain conductors." 10/20/10 Referee's Hearing, Tr. at 123. Borschet further testified that the appellant told him what wires to run to certain devices; that he was paid for these wires; and that the appellant gave him "everything down to the screw." 10/20/10 Referee's Hearing, Tr. at 123-125. Therefore, the referee's finding of fact and reference to Borchert's testimony is wholly supported by the record.

3. The appellant requests that the board delete the referee's finding of fact no. 16, which was adopted by the board, and which states that a portion of the appellant's business and profitability is dependent

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upon the installation/service work provided by the installers/technicians. The appellant maintains that this finding is unsupported by the evidence in the record and is based upon impermissible and unreasonable factual inferences. The appellant requests that the board substitute finding of fact no. 16 with a finding stating that the installation and service work performed by the installers and technicians generates a percentage of the appellant's revenues.

The appellant's request is **denied**.

The appellant sells heating, air conditioning and security equipment, including the installation of said equipment. 10/20/10 Referee's Hearing, Tr. at 141-142, 144-145. The appellant testified that it does not sell equipment that it does not install. 10/20/10 Referee's Hearing, Tr. at 139, 140. Thus, all of its sales are dependent upon installations by the installers/technicians, who install almost all of the heating and air conditioning equipment, and 90 per cent of the security systems. 10/21/10 Referee's Hearing, Tr. at 120-121. The appellant advertises the sale and installation of this equipment on its website, which website states: "When it's time for a new heating system, air conditioning system tank, call us first. *Our* state-licensed technicians will install *your* system the right way." (Emphasis supplied.) 10/20/10 Referee's Hearing, Tr. at 132-133. Therefore, it is both reasonable and permissible to infer that a portion of the appellant's business and profitability is dependent upon the installation and work done by the heating and air conditioning installers who were found employees of the appellant.

The appellant also advertises service of the equipment on its website. 10/21/10 Referee's Hearing, Tr. at 133. The technicians handle cleaning and service of security systems and furnaces when demand increases. 10/21/10 Referee's Hearing, Tr. at 122-124. Thus, it is reasonable and permissible to infer that a portion of the appellant's business and profitability is dependent upon the installation and service work done by the technicians who were found employees of the appellant.

The appellant also advertises security systems and monitoring. 10/21/10 Referee's Hearing, Tr. at 132-133. The appellant admitted that, when a customer requests installation of a security system, the customer will "probably want you to monitor for them." 10/21/10 Referee's Hearing, Tr. at 66. Thus, it is reasonable and permissible to infer that a portion of the appellant's business and profitability is dependent upon the installation and service work done by the security system installers who were found employees of the appellant.

4. The appellant requests that the board delete or modify the first sentence of the referee's finding of fact no. 6, which was adopted by the board, and which states that the appellant determines the equipment to be installed for each project and requires the installer to use the parts supplied by the appellant.

The appellant's request that we delete the first sentence of the referee's finding of fact no. 6 is **denied**.

The board's finding that the appellant determines the "equipment to be installed" is supported by the record. 10/20/10 Referee's Hearing, Tr. at 20, 78, 125-126; 10/21/10 Referee's Hearing, Tr. at 58, 102-105. The appellant in its motion does not dispute that fact, but simply seeks to modify the word

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"equipment" to "product." The appellant has offered no persuasive reason to modify this word. The board's finding that the appellant required the installers to use the parts that the appellant supplies is also supported by the record. See 10/20/10 Referee's Hearing, Tr. at 123; 10/21/10 Referee's Hearing, Tr. at 57-58, 102-105 (See, e.g., Tr. at103 in which appellant testifies that an installer would have to get permission to substitute a part).

The appellant also requests that the board delete the second sentence of the referee's finding of fact no. 6, which states that the installer may on occasion supplement with its own/other parts as deemed necessary to be reimbursed by the appellant. The appellant maintains that the record does not support the "generalized" finding of the board because only one technician/installer testified that he had encountered a complication on a job for the appellant which he remedied by installing an additional part from his own business inventory, which the appellant replaced. The appellant also maintains that the record contains no evidence that the appellant reimbursed installers for the parts they used on the job. Alternatively, the appellant requests that the board modify this portion of finding of fact no. 6 to limit the finding to one individual, Edward Chickos, and state that the appellant replaced the part rather than reimbursed the claimant.

The appellant's request is **denied**, except that we replace the word "reimbursed" with "reimbursed or replaced." The appellant offered no testimony at the referee's hearings to support a finding that the parts reimbursement was limited to Chickos, and did not claim that his relationship with the appellant was different from the appellant's relationship or agreement with other installers or technicians. In fact, the appellant presented Chickos as an "illustrative example" of the individuals in question. 10/20/10 Referee's Hearing, Tr. at 4. Moreover, the appellant specifically testified that an invoice from Michael Savage, at Alpine Heating, included an amount to reimburse parts used from his truck. 10/21/10 Referee's Hearing, Tr. at 79, 83-84. Contrary to the appellant's claim, Chickos testified that it was the appellant's general practice to reimburse the installer/technician for parts. Specifically, Cickos testified: "That would be when I go into a job and there is a complication on the job. I will supply the part to make the job work and then my part is replaced." 10/20/10 Referee's Hearing, Tr. at 34.

The appellant requests that the board adopt a finding that it provides installers with the product to be installed, such as an oil tank, a boiler, a furnace or an alarm system, and does not permit installers to substitute these products, but that it does not determine all of the equipment to be installed for each project nor supply installers with all of the parts required to effectuate the installation. The appellant maintains that the record supports that the appellant permits and expects the installers to effectuate installation of the products supplied by the appellant by using additional equipment, materials and/or parts that are not predetermined or provided by the appellant but by the installers at their own discretion and expense.

The record indicates that both the appellant and the individuals found to be employees supply certain parts. The company president, David Cohen, testified: "We supply certain parts. They supply certain parts." 10/20/10 Referee's Hearing, Tr. at 58.

The appellant's request to modify or replace finding of fact no. 6 is **granted** only to the extent that we add the following sentences to that finding for clarification: "The boiler installers supply piping,

tubing, fittings and cement as necessary for boiler installations, in addition to the parts that the appellant supplies and requires the installers to use. The appellant provided nozzles and strainers to individuals who serviced customers who had no heat or needed their furnaces cleaned. The security system installers receive from the appellant wires and 'everything down to the screws,' and they supply no parts at all." See 8/26/10 Referee's Hearing, Tr. at 131-132, 10/20/10 Referee's Hearing, Tr. at 20, 34, 123-126;10/21/10 Referee's Hearing, Tr. at 50-51, 58.

5. The appellant requests that the board delete the portion of the referee's finding of fact no. 17, which was adopted by the board, and which states that the appellant maintains a staff of employees to perform the same/similar services that it contracts with the technicians to perform. The appellant asserts that this portion of the finding is unsupported by the record and improperly suggests that the services performed by the technicians are equivalent to those performed by the appellant's employees, who perform a "host" of services beyond those performed by the technicians, including, but not limited to, delivering home heating oil and providing "on call" repair and emergency services daily, 24 hours a day.

The appellant requests, alternatively, that the board modify the referee's finding of fact no. 17 to state that the appellant sells service contracts to its customers that are central and core to its home heating oil delivery service and that technicians service customers' heating and cooling equipment when there exists excess or overwhelming demand that cannot be met by the appellant's own staff of technicians.

The appellant's request is **denied**.

There is ample evidence in the record to support the board's finding that the technicians perform services under the appellant's service contracts with customers which are the same or at least similar to those services which are performed by its regular employees. The appellant acknowledges in its motion that it is undisputed the technicians may clean and repair heating and cooling equipment in its customers' homes. In its testimony at the referee's hearing, the appellant could not cite any difference between the cleaning services which are provided by its staff versus the cleaning services which are performed by the individuals it characterizes as independent contractors, from the point of view of either the appellant or the customer. See 10/21/10 Referee's Hearing, Tr. at 147.

Moreover, the appellant fails to state why it is relevant whether its regular employees have more duties than those assigned to the technicians. In determining whether the appellant satisfied part B of the ABC test, the Connecticut Supreme Court has stated that the "usual course" requirement means that the activity must be performed by the enterprise on a regular or continuous basis, without regard to the substantiality of the activity in relation to the enterprise's other business activities. See *Mattatuck Musem-Museum Historical Society v. Administrator*, 238 Conn. 273 (1996); see also *Dance Fitness Connection v. Administrator*, Board Case No. 9000-BR-10 (5/10/10)(board held that because the assistant director taught dance classes as one of her duties, the appellant did not satisfy part B of the ABC test relative to the three dance instructors in question). In *Dance Fitness Connection*, the fact that the assistant director clearly held duties above and beyond teaching dance was not deemed relevant.

6. The appellant requests that the board delete its finding of fact no. 13, stating that if an installer or technician accepts an assignment from the appellant, the individual must perform his or her work

within a designated time frame set by the appellant and the customer.. The appellant maintains that this finding is unsupported by the evidence in the record of the case. The appellant requests that the board substitute this finding with a finding that the installers and technicians may cause scheduled service appointments to be changed and/or rescheduled and may change the time and/or order of appointments. The appellant also requests that the board adopt a finding of fact stating that the installers and technicians do not have set schedules or hours of work.

The appellant's request is denied. The board's finding is amply supported by the record and adequately describes the schedules worked by the installers and technicians. Jobs were planned at least two days in advance. 10/21/10 Referee's Hearing, Tr. 60. The appellant set up a day to perform work for a customer, and the appellant would find an installer or technician who was willing to accept that assignment. 10/21/10 Referee's Hearing, Tr. at 60-61, 130. If the installer or technician did not want to work on the day designated for the assignment by the appellant, the appellant would ask another individual to perform the assignment. 10/20/10 Referee's Hearing, Tr. at 168. The appellant scheduled the appointments with the customer. 8/26/10 Referee's Hearing, Tr. at 51. The installer and technicians could not set up an appointment directly with a customer. 10/21/10 Referee's Hearing, Tr. at 61, 95. The installers and technicians could not choose to perform work for a customer in the morning versus the afternoon, or vice versa. 10/21/10 Referee's Hearing, Tr. at 95. For example, the appellant advised customers that someone would arrive to perform work between 8:00 a.m. and 12:00 p.m., and the installer and technician could not change the appointment to an afternoon time. 10/21/10 Referee's Hearing, Tr. at 96. Thus, the record supports the board's finding that the work had to be performed within a designated time frame on a particular day, as agreed upon by the appellant and the customer.

7. The appellant requests that the board modify the portion of the referee's finding of fact no. 3, which was adopted by the board, and which states that the appellant does not own or operate tools, machinery or heavy vehicles required to *repair* heating systems. The appellant's request is granted.

The appellant also requests that the board delete the portion of the referee's finding of fact no. 3, which was adopted by the board, and which states that the appellant only rarely services equipment systems which were not installed by one of the installers on behalf of the appellant. The appellant's request is granted.

8. The appellant requests that the board delete the portion of the board's finding of fact no. 26 which states that the appellant has on occasion used a company employee to install equipment when no installers were available.

The appellant's request is denied.

The appellant's vice president, David Cohen, testified that "we do some (alarm installation). If we do 10 per cent, that's probably a lot." 10/21/10 Referee's Hearing, Tr. at 121. He further responded as follows to a question as to whether all alarm installations were subcontracted: "The vast majority is subbed out....it is possible we have done some installations." 10/21/10 Referee's Hearing, Tr. at 122. Additionally, when asked if the company had installed any furnaces or air conditioning in house, Cohen responded: "There could be a situation, where we had to, and we told the customer we're going there, and the guy was sick or something." 10/21/10 Referee's Hearing, Tr. at 123. Thus, the

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board's finding is supported by the record.

9. The appellant requests that the board delete finding of fact no. 18, which states that the employer reported Walter Camp as an employee at the time of the referee's hearings.

The appellant's request is **denied**. The appellant in its motion admits reporting wages for this individual. No wages would be reported if the appellant had not reported Camp as an employee. Moreover, at the referee's hearing, the appellant admitted that Camp had been reclassified as an employee pursuant to a settlement of charges for 2002 through 2006. 10/21/10 Referee's Hearing, Tr. at 10.

10. The appellant requests that the board delete its factual conclusion that the marketability of the appellant's equipment is enhanced by an installation being part and parcel of any sale. The appellant maintains that this finding is unsupported by the evidence and is based upon impermissible factual inferences. The appellant further maintains that the board's use of the word "presumably" indicates that the board made a presumption rather than a finding of fact.

The appellant's request is **denied**.

The board used the word "presumably" to mean "reasonably assume." The board made a reasonable and logical inference that customers would prefer to buy equipment which would be installed as part of the sale as a matter of convenience. A customer who did not do so would have to buy the equipment from the appellant, rent a box truck to pick it up at a supply house, and look for another company to do the installation.

11. The appellant requests that the board adopt a finding of fact that a contractor agreement was executed by each of the installers and technicians at issue in this case, as stipulated by the parties at the referee's hearing.

The appellant's request is **denied**, since the referee's finding of fact no. 14, as modified by the board, states that the installers and technicians were required to enter into a contractual agreement. 10/20/10 Referee's Hearing, Tr. at 102.

12. The appellant requests that the board modify the board's finding of fact no. 12 to add that the independent businesses owned and operated by the installers and technicians have their own customers, separate and apart from the appellant.

The appellant's request is **denied**. The appellant provided evidence that the individuals in question held themselves out to the public as being engaged in independent activity and the board inferred that these individuals were engaged in that activity based upon their business cards, continuing advertisements and/or trucks. However, the record does not contain specific or reliable evidence that each individual had their own customers. See, for example, testimony regarding Ranilla, Savage, Vannart and Vaugh; 10/21/10 Referee's Hearing, Tr. at 63-72, 77, 79-89, 96-105. The appellant also conceded that Walter Camp might not be working for anyone other than the appellant. 10/21/10 Referee's Hearing, Tr. at 4. Moreover, the board ruled that the appellant satisfied Part C of the ABC test, and that conclusion is not disputed by the appellant.

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13. The appellant requests that the board adopt a finding of fact stating that each of the installers and technicians maintains liability insurance coverage at their own expense.

The appellant's request is **denied**. The board adopted the referee's finding of fact no. 14, which states that the contractual agreement requires installers and technicians to maintain specific insurance coverage. However, the board grants the request in part, in that it modifies its finding of fact no. 14 to replace the word "specific" with "liability."

14. The appellant requests that the board adopt a finding of fact stating that the installers and technicians do not maintain offices or workspace or perform services or other work at the appellant's offices, as stipulated by the parties at the referee's hearing.

The appellant's request is **granted**, in part. The board adopts the following finding of fact, which was stipulated upon at the October 20, 2010 hearing: The technicians and installers performed all work outside of the offices of the appellant. 10/20/10 Referee's Hearing, Tr. at 140.

15. The appellant requests that the board adopt a finding of fact stating that the installers and technicians are free to accept or reject assignments offered to them without adverse consequences, as stipulated by the parties at the referee's hearing.

The appellant's request is **granted**.

16. The appellant requests that the board adopt a finding of fact stating that the installers and technicians are not paid a salary or hourly wage and do not receive fringe benefits. The appellant maintains that the parties stipulated at the referee's hearing that the installers and technicians are paid a fixed price per job and do not receive fringe benefits.

The appellant's request is **denied**. The board's finding of fact no. 15 already states that the installers and technicians are paid a set rate per piece of work. The finding requested by the appellant is redundant.

17. The appellant requests that the board adopt a finding of fact stating that the installers and technicians do not receive instruction or direction from the appellant in performing their services.

The appellant's request is **denied**. The record does not show that the installers and technicians receive no instruction or direction from the appellant in performing their services. As explained in section 2 above, the appellant provides instruction to the security alarm installers regarding the wiring method and parts. 10/20/10 Referee's Hearing, Tr. at 123-125. The installers receive instructions regarding the parts to be used. See 10/20/10 Referee's Hearing, Tr. at 20, 78, 125-126; 10/21/10 Referee's Hearing, Tr. at 58, 102-105. The appellant required the installers to use the parts that the appellant supplies. See 8/26/10 Referee's Hearing, Tr. at 51; 10/20/10 Referee's Hearing, Tr. at 123; 10/21/10 Referee's Hearing, Tr. at 57-58, 102-105. The installers and technicians are directed when to perform their assignments. 8/26/10 Referee's Hearing, Tr. at 51; 10/21/10 Referee's Hearing, Tr. at 60-61, 95-96,130; 10/20/10 Referee's Hearing, Tr. at 168.

18. The appellant requests that the board adopt a finding of fact stating that the installers and technicians are liable to the appellant for repairs and costs associated with defective work.

The appellant's request is denied. The board has already adopted a finding requiring that the installers and technicians at issue maintain liability coverage. The requested finding is redundant. Moreover, the portion of the transcript the appellant cites to support its finding (10/20/10 Referee's Hearing, Tr. at 23-24) does not support its contention. Additionally, the appellant cites as evidence the property settlement check issued to the appellant; however, the appellant also maintained liability coverage for problems stemming from the work of the technicians and installers. 8/26/10 Referee's Hearing, Tr. at 87-88. Thus, the appellant's maintaining coverage is distinguishable from its actual liability.

To the extent that the appellant is requesting that the board adopt a finding that the installers and technicians were required to return to correct problems found with their work, that request is granted. However, we add to that new finding the following sentence, for purposes of clarification: "The appellant warrants the installed equipment, including parts and labor." 10/21/10 Referee's Hearing, Tr. at 126.

19. The appellant requests that the board modify the referee's finding of fact no. 9, which was adopted by the board, to state that the installers and technicians are *not required* to display the appellant's name on their apparel or vehicles, and security system installers are required to display photographic identification badges identifying themselves as subcontractors for the appellant. The appellant maintains that the finding that the appellant "encourages" individuals to display the appellant's name on their apparel and vehicles is not supported by the record.

The appellant's request is granted, except that the board adds the following sentence as clarification: "The appellant provides the installers and technicians with shirts and hats labeled 'Standard Oil' with the understanding that wearing these items could alleviate any customer concern or confusion when they appear at a customer's residence." 8/26/10 Referee's Hearing, Tr. at 63, 114; 10/20/10 Referee's Hearing, Tr. at 129.

20. The appellant requests that the board adopt a finding of fact stating that the installers and technicians did not view themselves as or believe that they were employees of the appellant, as stipulated by the parties at the referee's hearing.

The appellant's request is denied. The parties' characterization of their relationship is not determinative. See *Proctor v. George Weston Bakery*, Board Case No. 9007-BR-09 (11/18/09). The installers and technicians are not unemployment compensation experts and would not base their belief upon the appellant's satisfaction of the ABC test. Moreover, the parties cannot enter into an agreement whereby the potential claimants waive their right to unemployment compensation benefits. See General Statutes § 31- 272(2).

21. The appellant requests that the board adopt a finding of fact stating that the installers and technicians may negotiate and have negotiated modifications to the contractor agreements executed with the appellant.

The appellant's request is **denied**. The appellant has not demonstrated why the requested finding of fact is material to a determination of whether it has satisfied the statutory ABC test. The relevant factors are who has the right to control the means and methods; what shall be done; when it should be done; and how it should be done. See *Daw's Critical Care Registry, Inc.*, 42 Conn. Sup. 376, 394, 622 A.2d 622 (1992), aff'd *Daw's Critical Care Registry, Inc* , 225 Conn. 99, 622 A. 2d. 518 (1993) (per curiam). In support of its request, the appellant cites portions of the transcript indicating that two of the individuals at issue negotiated the amount of necessary insurance coverage, the language of the nonsolicitation clause and the contractor warranties, which are matters unrelated to the means and methods of performing the services.

23. The appellant requests that the board modify the referee's finding of fact no. 2, which was adopted by the board, to reflect that the portion of the appellant's business that is not generated from its home heating oil delivery business includes home alarm system monitoring.

The appellant's request is **granted**. The final sentence of the referee's finding of fact no. 2 is modified to insert the word "monitoring" after the word "installation" and prior to the phrase "and maintenance."

BOARD OF REVIEW

Lynne M. Knox, Chair,
ES Board of Review

In this decision, Alternate Board Members Elizabeth S. Wagner and Robert F. Harlan concur.

LMK:ASK:mle

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WP-1 (9/06)

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IMPORTANTE - TENGA ESTO TRADUCIDO
INMEDIATAMENTE - TIEMPO LIMITADO PARA APELAR

Claimant's Name, Address & S.S. No.

Case No.: 9019-DD-09

S. S. #:

Employer's Name, Address, & Reg. No.

Standard Oil of Connecticut Inc.
299 Bishop Avenue
P.O. Box 4005
Bridgeport, CT 06607-505

E. R. No. : 57-017-95

Mailing Date : August 16, 2011

DECISION OF APPEALS REFEREE

CASE HISTORY

On August 6, 2009, the administrator determined that the services performed for Standard Oil of Connecticut by certain individuals constitute employment as defined in the Connecticut Unemployment Compensation Law, Section 31-222(a)(1)(B)(ii). Specifically, the administrator reclassified William Parks, Ben Cerreta, Michael Bonis, Brian Borchert, Christopher Doiron, Bartholomew Liquigly, David Vaughn, Edward Chickos, Gary Vannart, Gregory Ricard, Joseph Demers, Kenneth Wakeman, Michael Kosiorek, Michael Ranilla, Robert Dutch, Edward Cochiss, Scott Olexavitch, Michael Poirer, Timothy Braca, Walter Camp, Paul Delgobbo, William Miller, Brian Parks, Michael Savage, Marcel Aardewerk, Ted Nartowicz and David Booth, from independent contractors to employees.

The employer filed a timely appeal from the administrator's determination on August 26, 2009. The referee heard the employer's appeal on August 26, 2010, October 20, 2010, and October 21, 2010.

APPEARANCES

Michele Higgens, supervisor, with Colleen Davies, revenue examiner 3, represented the Administrator, Bridgeport Field Audit. Virginia Hill, tax unit manager, observed.

David Cohen, vice-president, with Attorney Glenn Duhl, represented the employer, Standard Oil of Connecticut. Ramy Peress, the CFO, participated on August 26, 2010, and October 20, 2010. Bartholomew Liquigly appeared as a witness on August 26, 2010. Edward Chickos, Robert Dutch, Scott Olexavitch, Brian Borchert and Mike Poirer Jr., appeared as witnesses on October 20, 2010.

The administrator and the employer submitted written briefs to the referee on November 16, 2010.

FINDINGS OF FACT

1. Standard Oil is primarily in the business of home heating oil delivery. It further provides for twenty-four (24) service calls/ "no heat calls", heating and cooling system repair and maintenance; heating and cooling system installation and maintenance. It further provides for home alarm system installation and maintenance, albeit on a more limited basis.

2. Approximately 90% of Standard's business is generated from its home heating oil delivery service. The remaining % of the business results from its heating and cooling system installation and repair, home alarm system installation and maintenance and its service work which is routinely part of the service contracts it offers its customers. The employer advertises home heating oil delivery, heating and cooling installation and maintenance, tank removal, service work and home alarm system installation to its customers and potential customers in the yellow pages.

3. The employer does not own or operate the tools, machinery or heavy duty vehicles required to install/repair heating systems, tank removal or home alarm installation. As a result, it 'contracts' the work to individuals who routinely perform such work either for their own business or self employment.

4. Heating and cooling installation, home alarm installation, and tank removal are performed by a variety of individuals who either own their own business and/or are self-employed (installers). Service and maintenance work on the heating and cooling systems are performed by a variety of individuals who either own their own business and/or are self-employed (service technicians).

5. Installers are neither supervised by Standard Oil nor does Standard inspect their work. There is no representative of Standard Oil on the premises at anytime during the installation project while it is in progress nor upon its completion. The same is applicable to the technicians.

6. Standard determines the equipment to be installed for each project and requires the installer to use the parts supplied by Standard. On occasion, the installer may supplement with its own/other parts as deemed necessary to be reimbursed by Standard. Installers use their own equipment and tools to complete each project. The installer does not pay for the equipment installed on the project which is provided by Standard. The same is applicable to the technicians.

7. Fees are determined and set by Standard. Neither the installers nor the technicians submit 'bids' to perform their services and are free to decline and work offered by Standard without penalty.

8. Standard bills each customer and accepts payment to Standard for installation and service work. Neither the installers nor the technicians bill or accept payment from the customer.

9. Installers and technicians are encouraged to display the Standard Oil name on their clothing (shirts, hats), and the utility vehicles they use to perform their work. Alarm installers are to use/display a Standard Oil badge/ID.

10. Installers and technicians are limited to provide the installation/service which Standard has sent them to perform. If a customer requests additional work/services, the installer/technician must direct the customer to contact Standard directly. Installers/technicians are not allowed to perform additional work/services for said customers without permission and/or direction from Standard.

11. Installers/technicians are prohibited from sending another party in its place once it accepts a job from Standard. They are free, however, to bring 'helpers' of their own choice.

12. The majority of the 'contractors' identified maintain their own business. The percentage of work they perform for their own entity, ie their income, vs. Standard varies per individual/business. Some 'contractors' derive up to 98% of their income performing work for Standard.

13. The scheduled dates and times, appointments, for the customer's work is determined by Standard. Both installers and technicians are required to notify Standard of their arrival and departure times from the customer's location.

14. Installers and technicians are required to sign a Contract Agreements which has been drafted by Standard. The Agreement requires installers and technicians to maintain a current license and specific insurance coverage(s).

15. Standard requires installers and technicians to submit weekly invoices for each installation/service utilizing the fee/price list set by Standard.

16. Installers and technicians generate a percentage of Standard's revenues. This portion of Standard's business and profitability is dependent on the installation/service work provided by the installers/technicians.

17. The employer sells service contracts to its customers which is central and core to its home heating oil delivery service. While the employer maintains a staff of employees to perform such services, it 'contracts' with the technicians to perform the same/similar services to its customers. These technicians are subject to the same terms and conditions as the installers in regard to appointments, billing, clothing, work performed and licensing and insurance requirements.

18. The administrator previously identified Walter Camp as an employee in a prior audit. The employer reports/reported Mr. Camp as an employee at the time of the referee's hearing(s).

ISSUE

The issue before the referee is whether the administrator properly reclassified the previously identified individuals as employees of Standard Oil.

PROVISIONS OF LAW

Section 31-222(a)(1)(A) of the General Statutes provides that "employment," subject to the provisions of the Unemployment Compensation Act, means any service performed under any express or implied contract of hire creating the relationship of employer and employee.

Section 31-222(a)(1)(B)(ii) of the General Statutes further provides that "employment" means any service performed by an individual who, under either common law rules applicable in determining an employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual will be considered employment subject to the Act irrespective of whether the common law relationship of master and servant exists, unless (I) the individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside all of the places of business of the enterprise for which the service is performed; and (III) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

ANALYSIS AND CONCLUSION OF LAW

Part A Freedom from Direction and Control

Standard neither supervises nor does it inspect the work performed by installers or technicians. However, it does set the price/fee for each service/installation. It further sets the appointment schedule for customer calls, requires installers and technicians to maintain current licensing and insurance coverage. It determines what services are to be performed and restricts/prohibits installers

and technicians from performing any further work/service without explicit permission from Standard. It maintains direct control of all billing direct to the customer and has in place specific invoicing requirements. Lastly, it requires installers and technicians to report their arrival and departure times to customer homes directly to its office. As such, the referee is not satisfied that the installers and technicians are free from all direction and control of Standard. As a result, the referee does not find that the employer has satisfied Part A of the ABC test.

Part B Service is Performed Outside the Employer's Normal Course of Business or Place of Business

The employer advertises to its customers, and potential customers, home heating oil delivery, contract service work on heating and cooling systems, installation of heating and cooling systems, tank removal and home alarm systems. These contract, service and installation work accounts for approximately 10% of the employer's business/revenues. Installers and technicians perform their work at the sites the employer contracts to provide its services.

Part B of the ABC test requires that the service of an independent contractor be performed outside the usual course of business for which the service is performed or outside of all places of business of the enterprise for which the service is performed. This sub-test is in the alternative, and the employer need only establish that the service is either outside the course or place of its business. The place of business is not only the office, but the individual job sites at which the employer contracts to provide service. See *Greatorex v. Stone Hill Remodeling*, Board Case No. 1169-BR-88 (1/9/88), aff'd sub nom. *Stone Hill Remodeling v. Administrator*, Superior Court, Judicial District of Waterbury, 2/21/91; *Feschler v. Hartford Dialysis*, Board Case No. 995-BR-88, (12/27/88).

As a result, the referee finds that the installers and technicians perform services that are within the employer's normal course of business, albeit, a smaller percentage than its home heating oil delivery. As a result, the referee finds that the employer has failed to satisfy Part B of the ABC test.

Part C Individual is Customarily Engaged in an Independently Established Trade, Occupation, Profession or Business of the Same Nature as that Involved in the Service Performed.

While the majority of the individuals listed maintain their own business apart and aside from Standard, when performing service(s)/installation for Standard Oil, they are prohibited from setting their own price(s), are required to use the equipment designated by Standard and are further required to follow reporting and billing procedures set forth by Standard. Furthermore, they are encouraged to 'blend' as employees of Standard by displaying the Standard Oil name on their clothing and vehicles. The record establishes that at least some of the individuals previously identified derive most of their income by performing work for Standard Oil leaving at issue the ability of these businesses to survive were it not for the relationship they maintain with Standard. The independent services offered to outside customers are not of the same nature as that for the employer. As a result, the referee does not find that the employer has satisfied Part C of the ABC test.

Section 31-222(a)(1)(B)(ii) of the General Statutes, commonly known as the ABC test, is conjunctive and all three prongs of the ABC test must be satisfied in order to find that a service is excluded from employment. The referee finds that the employer has failed to satisfy all three parts of the ABC test for the individuals previously identified and that the administrator has correctly re-categorized those individuals as employees.

DISPOSITION AND ORDER

The administrator's determination is **affirmed** and the employer's appeal is **dismissed**.

Karen D. Schumaker
Karen D. Schumaker
Principal Appeals Referee

KDS:mo

IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY MAY 20, 2011. SEE NEXT PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL RIGHTS.

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(4/01)

NOTICE OF APPEA[illegible]TS

This decision shall become final on the twenty-second (22nd) calendar day after the date of mailing unless, before that date, a party either appeals this decision to the Board of Review or moves the Referee to reopen, vacate, set aside or modify the decision. The appeal or motion may be mailed or faxed to the Appeals Division at the address or fax number listed in the heading of this decision. The appeal or motion may also be filed in person at any Connecticut Works/Job Center, or by the Internet at www.ctboard.org. PLEASE NOTE: To be timely filed, the appeal or motion must be actually received at any such office no later than the twenty-first (21st) calendar day after the date of mailing of this decision or, if filed by mail, must bear a legible United States Postal Service postmark showing that it was placed in the possession of the Postal Service for delivery within such twenty-one day period. Postmarks attributable to private postage meters are not acceptable, but you may use one of the private delivery services approved by the IRS: Airborne Express, DHL Worldwide Express, Federal Express, or United Parcel Service. If filed by fax or Internet, the appeal must be received by the Connecticut Appeals Division or the Department of Labor by 11:59 p.m. on the twenty-first day. The last day for filing an appeal or motion is listed at the end of the Referee's decision.

If the appeal or motion is late: Neither the Board of Review nor the Referee can entertain an untimely appeal or motion unless the appealing party can show good cause for failing to file the appeal or motion on time. Therefore, if your appeal or motion is late, you should explain why.

FORMS AND ASSISTANCE ARE AVAILABLE AT EACH CONNECTICUT WORKS/JOB CENTER OFFICE FOR USE IN PREPARATION OF AN APPEAL. Each appeal may be filed by means of the prescribed form or a typed or legibly written statement which describes and explains all reasons for the appeal. The Board issues a written decision addressing the legal and factual claims stated in every timely-filed appeal. Generally, appeals are decided by two of the three members of the Board on the basis of the existing record, and the Board does not hold a further hearing. An appeal may include, under separate headings, a request for a decision by the full three-member Board, a request for a further evidentiary hearing indicating the reasons for such request, or written argument in support of the appeal. NOTICE TO THE CLAIMANT: (1) If you appeal this decision, you should continue to file benefit claims, as directed, while unemployed to protect your benefit rights. (2) If you have already been paid unemployment compensation benefits and the decision of the Referee is against you, an overpayment will be established in your account which you may have to repay. Once this decision becomes final, you will not have another opportunity to contest the decision of ineligibility which created the overpayment.

NOTIFIC[illegible]N DE DERECHOS DE APELACION

Esta decisión se considerará final a los veintidós (22) días calendario después de la fecha de envio, a menos que, antes de esa fecha, cualquiera de las partes apele esta decisión a la Junta de Revisión (Board of Review). La parte afectada apela ante la Junta de Revisión o conduce al árbitro a re-abrir, anular, ignorar o modificar la decisión. La apelación o moción puede ser enviada por correo o por medio del fax a la División de Apelaciones a la dirección postal o número de fax arriba mencionado. La apelación o moción también puede ser registrada en persona en cualquier oficina de Connecticut Works/Job Center,o por Internet a www.ctboard.org. POR FAVOR NOTE: Para que su apelación tenga validez debe ser enviada a una de estas oficinas dentro de los próximos 21 días calendario a la fecha de envío de esta decisión o si la envia por correo, debe tener una marca de matasello legible del Servicio de Correo de los Estados Unidos de América, indicando que fue colocado en el correo dentro de este periodo. No serán aceptados matasellos o marcas de correo privado, pero usted puede utilizar los servicios de correo privado aprobados por el IRS: Airborne Express, DHL Worldwide Express, Federal Express o United Parcel Service. En caso de ser enviado por fax o Internet, la apelación debe ser recibida por el Departamento del Trabajo o la División de Apelaciones antes de las 11:59 p.m. del vigésimo primer día (21). El último día para presentar una apelación o moción se encuentra al final de la decisión tomada por el Arbitro.

Si la apelación o moción es tardía: Ni la Junta de Revisión (Board of Review) ni el Arbitro (Referee) pueden considerar una apelación que haya sido enviada después de la fecha límite, a menos que la parte afectada pueda demostrar con causas justas el motivo de la demora.

TENEMOS FORMULARIOS Y AYUDA DISPONIBLE EN CADA OFICINA DE COMPENSACION POR DESEMPLEO PARA UTILIZAR EN LA PREPARACION DE UNA APELACION. Cada apelación puede registrarse por medio de formularios establecidos o una declaración escrita legible explicando todas las razones para la apelación. La Junta promulga una decisión escrita señalando los aspectos legales y los objetivos establecidos en cada apelación que se haya presentado a tiempo. Generalmente, las decisiones de estas apelaciones están tomadas por dos de los tres miembros de la Junta, basada en el documento actual, y la Junta no tiene otra audiencia de evidencia. Una apelación puede ~~incluir bajo títulos diversos,~~ una petición para que la decisión sea tomada por los tres (3) miembros de la Junta; o una petición solicitando otra audiencia de evidencia indicando las razones de tal petición, o un argumento escrito que respalde su apelación. AVISO AL RECLAMANTE: (1) Si usted apela esta decisión, debe continuar sometiendo su reclamación de beneficios todas las semanas, como se indica, mientras está desempleado para proteger sus derechos de beneficios. (2) Si usted ya recibió beneficios de compensación por desempleo y la decisión del árbitro no está a su favor, se establecerá un sobrepago en su cuenta el cual usted tendría que repagar. Cuando esta decisión llegue a ser final, no tendrá otra oportunidad para disputar la decisión de inegibilidad que creó el sobrepago.

BR-1 #

STATE OF CONNECTICUT
Department of Labor
Employment Security Appeals Division
Board of Review
200 Folly Brook Blvd.
Wethersfield, CT 06109

IMPORTANTE - TENGA ESTO TRADUCIDO
INMEDIATAMENTE - TIEMPO LIMITADO PARA APELAR

Claimant's Name, Address & S.S. No.

ADMINISTRATOR

SS#

Employer's Name, Address & Reg. No.

FIRST FEDERAL SAVINGS & LOAN
ASSOC.
First Federal Plaza
Waterbury, CT 06702
Att: Renee Seerfried, P.C.

ER# 61-092-05

Board Case No: 9031-BR-93

1. Appeal from Referee's determination dated: August 6, 1992

   Case No: 9013-EE-92

2. Date appeal filed: August 26, 1993

3. Appeal filed by: Employer

4. Date mailed to interested parties: May 11, 1994

DECISION OF BOARD OF REVIEW

I. CASE HISTORY.

On October 7, 1991, the Administrator determined that First Federal Savings and Loan Association of Waterbury (hereinafter known as "First Federal") succeeded to, and thus acquired the experience rating records of Suffield Savings Bank (hereinafter known as "Suffield"). First Federal protested the Administrator's determination on October 22, 1991. By a decision issued in Referee Case No. 9015-EE-91, Referee William F. Jones remanded the case to the Administrator on December 24, 1991, to give First Federal the opportunity to be heard by the Administrator prior to the Administrator's issuing his determination.

On January 3, 1992, the Administrator's Employer Status Unit issued a determination that First Federal succeeded to Suffield. First Federal filed an appeal to the Referee on January 8, 1992, within the twenty-one day appeal period provided by the Administrator's determination. Appeals Referee Charles C. Dearborn held a hearing on the matter, designated as Referee Case No. 9013-EE-92, on June 18, 1992, and continued the hearing to July 2, 1992.

At the hearing on June 18, 1992, Referee Dearborn granted the request of the Federal Deposit Insurance Company (FDIC) that it be made a party to the appeal. By a decision issued on August 6, 1993, Referee Dearborn dismissed First Federal's appeal for lack of subject matter jurisdiction. On August 26, 1993, before the Referee's decision became final, the Administrator filed a motion to transfer the case to the Board of Review. On the same day, First Federal filed a motion to reopen the Referee's decision. Pursuant to Conn. Gen. Stat. §31-248a, the Board granted the Administrator's motion to transfer the matter to the Board of Review on October 8, 1993.

II. JURISDICTION.

Pursuant to Conn. Gen. Stat. §31-248 and Conn. Agencies Regs. §31-237g-31, the Board transferred this matter to the Board of Review on October 8, 1993 from a motion filed by the Administrator on August 26, 1993,[1/] before the Referee's August 6, 1993 decision became final.

On August 6, 1993, Appeals Referee Charles Dearborn issued a decision in which he dismissed the appellant/employer's appeal for lack of jurisdiction. Referee Dearborn concluded that the employer did not have the right of appeal to the Appeals Division from the Administrator's determination, but that it had the right to appeal from the Administrator's determination directly to the Superior Court pursuant to Conn. Gen. Stat. §31-270.

Section 31-237j(a) of the Connecticut General Statutes provides that:

> [t]he referees shall promptly hear and decide appeals from the decisions of the administrator of this chapter, or his designee, appeals from all other determinations made pursuant to any provision of this chapter and appeals from any proceeding conducted by authorized personnel of the employment security division pursuant to directives of the United States of America and the Secretary of Labor of the United States. Except as otherwise provided in this chapter or in the applicable federal directives, appeals to referees shall be filed within the time limits and under the conditions prescribed in section 31-241.

Subsection (b) of Section 31-237j of the Connecticut General Statutes further provides for state-wide jurisdiction and venue.

There is reference in §31-237j(a) to Conn. Gen. Stat. §31-241 for the time limits and other conditions for the filing of an appeal from the Administrator's determination. Although Conn. Gen. Stat. §31-241 deals specifically with provision of notice of the Administrator's determination and appeal rights from that determination after the initiation of a claim, the time limits and other conditions under which appeals may be filed, such as the rules for postmark filing and the good cause provision for untimely appeals, are adopted by reference.

The broad grant of jurisdiction set forth in Conn. Gen. Stat. §31-237j(a) was established by a statute enacted in 1974, when the Connecticut General Assembly abandoned the Unemployment Commissioner system and established the Referee section of the Appeals Division. At the time §31-237j(a) was adopted, Conn. Gen. Stat. §31-270 already provided appeal rights to the Superior Court under certain circumstances.

Section 31-270 of the Connecticut General Statutes provides, in pertinent part, that:

> [i]f an employer fails to file a report for the purpose of determining the amount of contributions due under this chapter, or if such report when filed is incorrect or insufficient and the employer fails to file a corrected or sufficient report within twenty days after the administrator has required the same by written notice, the administrator shall determine the amount of contribution due, with interest thereon pursuant to section 31-265, from such employer on the basis of such information as he may be able to obtain and he shall give written notice of such determination to the employer. Such determination shall be made not later than three years subsequent to the date such contributions became payable and shall finally fix the amount of contribution unless the employer, within thirty days after the giving of such notice, appeals to the superior court for the judicial district of Hartford-New Britain or for the judicial district in which the employer's principal place of business is located. Said court shall give notice of a time and place of hearing thereon to the administrator. At such hearing the court may confirm or correct the act of the administrator.

This provision gives employers a thirty-day right to appeal directly to the Superior Court from the Administrator's estimate and assessment of the amount of contributions due after an employer fails to file a report when it was due or fails to correct a report when requested to do so by the Administrator.

"A primary rule of statutory construction is that if the language of the statute is clear, it is assumed that the words themselves express the intent of the legislature;...and there is no need to construe the statute." (Citations omitted.) Federal Aviation Administrator v. Administrator, 196 Conn. 546, 550, 494 A.2d 564 (1985). Another well-accepted rule of statutory construction is that the legislature is "always presumed to know all the existing statutes and the effect its action or non-action will have upon any one of them. And it is always presumed to have intended that effect which its action or non-action produces." (Citations omitted.) New Haven Water Co. v. North Branford, 174 Conn. 556, 565, 392 A.2d 456 (1978); Gentry v. Norwalk, 196 Conn. 596, 609, 494 A.2d 1206 (1985).

Applying these principles of construction to the instant case, it must be presumed that the legislature knew and intended the exception of Conn. Gen. Stat. §31-270 to its general grant of jurisdiction to the Referee section. As the Board noted in Wakeman-Walworth, Inc., Board Case No. 2-TBR-87 (8/2/89), §31-270 is clearly limited to appeals from determinations of delinquent contributions.[2/]

An appeal pursuant to Conn. Gen. Stat. §31-270 commonly arises when the Administrator levies an administrative assessment ex parte, without notice or hearing. See Electrolux Corp. v. Danaher, 9 Conn. Sup. 237 (1941), in which the Administrator levied an assessment after concluding that certain sales representatives of the dependent were employees rather than independent contractors. See also Latimer v. Administrator, 216 Conn. 237 (1990). The Administrator's assessment may be derived from estimated figures based on the best information available to the Administrator. See Eilene's Beauty Parlor, Inc. v. Danaher, 11 Conn. Sup. 340 (1942).

The Superior Court has noted that the only opportunity for the party being deprived of property by the imposition of a tax to have its day in court may be through a judicial hearing and determination of the facts de novo. Robert C. Buell & Co. v. Danaher, 8 Conn. Sup. 141 (1940). Where there has not been a full hearing and record made at the administrative level, the court may receive evidence as to testimony before the administrative board and the proceedings upon which it acted or determine for itself facts to determine whether the Administrator improperly assessed the tax, assessed it for an incorrect amount, or otherwise acted illegally. Beaverdale Memorial Park, Inc. v. Donaher, 127 Conn. 175 (1940). In an appeal from an assessment for unpaid contributions in Daw's Critical Care Registry, Inc. v. Dept. of Labor, 225 Conn. 99 (1993), aff'g and adopt'g 42 Conn. Sup. 376 (1992), the parties agreed to a procedure whereby the parties submitted to the court eighty-two stipulated facts, stipulated exhibits and operative pleadings. Additional evidence was then introduced at trial through witnesses and additional exhibits. In Latimer v. Administrator, 216 Conn. 237 (1990), which was also an appeal from an assessment for unpaid contributions, the parties agreed, subsequent to the filing of an appeal pursuant to Conn. Gen. Stat. §31-270, to an evidentiary hearing before a hearing officer appointed by the Administrator. The Connecticut Supreme Court eventually upheld the hearing officer's decision.

Whether a judicial hearing has been held or the parties stipulated to an administrative hearing, the Connecticut Supreme Court has noted that the function of the court, in its review, is to determine whether the Administrator's conclusion is unreasonable, arbitrary or illegal. See, e.g., Cervantes v. Administrator, 177 Conn. 132 (1979). This includes the court's review for any error in the Administrator's construction of the agency's authorizing statutes. Latimer v. Administrator, supra; Daw's Critical Care Registry, Inc. v. Dept. of Labor, supra; Ogazalek v. Administrator, 22 Conn. Sup. 100, 104 (1960).

The exception to the general jurisdictional rule of Conn. Gen. Stat. §31-237j(a) created by Conn. Gen. Stat. §31-270 allows for two distinct methods by which determinations can be appealed to court. An appeal from an assessment for delinquent contributions must be appealed directly to the Superior Court. See, e.g., Latimer v. Administrator, supra. On the other hand, the Referee has jurisdiction to consider a determination by the Administrator other than an assessment of the amount of contributions due, even if that determination might be a necessary step to calculate a delinquent assessment of contributions.[3/] See Wakeman v. Walworth, Inc., supra at 2.

The Referee's grant of jurisdiction would include an appeal arising from a claim for benefits which led to the Administrator's determination that a claimant was engaged in covered employment, rather than working as an independent contractor. Following a hearing and determination by the Referee, a further review by the Board of Review, and a subsequent appeal to the Superior Court, the court has determined, generally on the record before it, whether there is a logical and rational basis for the decision or whether the underlying decision on the claimant's status as employee or independent contractor was illegal or an abuse of discretion. See, e.g., Stone Hill Remodeling v. Administrator, Docket No. 039398, Superior Court, Judicial District of Waterbury, 2/21/91. The employer has the right to appeal directly to the Superior Court, pursuant to Conn. Gen. Stat. §31-270, from any assessment for contributions due which is subsequently made by the Administrator.

Once an individual claimant is determined to be an employee rather than an independent contractor, the question may arise as to whether other individuals providing different or similar services to the same entity may also be considered employees. This requires a determination by the Administrator of the status of these other individuals, since employer liability for other unnamed individuals does not automatically flow from a determination that a particular individual is an employee. See Arrow Building Maintenance v. Administrator, Docket No. 285993, Superior Court, Judicial District of Hartford-New Britain at Hartford, 5/15/85. Although it may be a necessary result of the Administrator's determination that an individual is an employee and not an independent contractor and thus the employer would be considered liable for benefits awarded, the assessment of contributions due may not be made until the underlying independent contractor and eligibility issues are resolved. The Administrator may not be in a position to determine the amount of contributions due while these issues are pending.

A determination short of an assessment which might also be subject to an appeal to a Referee includes a finding that an employer succeeded to another employer or a determination of an employer's tax rate. There is often an underlying question of potential liability for benefits awarded to an individual which led to the investigation resulting in the initial determination, and in such cases, where the chargeability issue may be unresolved, it may be premature for the Administrator to make an assessment of contributions due despite the language in §31-270 directing the Administrator to determine the amount of contributions due.[4/] More importantly, however, the successor will be affected prospectively. The

employer's tax rate would not be affected until the next calendar year after the acquisition, when the predecessor's rate is merged with the successor's rate. The tax rates are based on a three-year experience rate computed after the close of the last year, see Conn. Gen. Stat. §31-225a(e)(1), and thus the actual rate cannot necessarily be computed at the time the successor determination is made. Moreover, since the tax rate is not affected until the end of the year, there may be no contributions due as a result of a successor determination at time of the determination, and thus the Administrator has no basis for assessing contributions due at that time.

The procedural course of a particular case may be fortuitous, with some cases being directly appealed to the Superior Court because the Administrator issued an assessment in the case, and other cases being subjected to more administrative process before an appeal to court may be filed because there has been no assessment made from which to appeal. When the Administrator becomes aware that contributions may be due as a result of an initiating claim for benefits or a determination that an employer succeeded to another, the Administrator may have refrained from making any determination with regard to contributions due while the underlying issue, and thus the employer's liability, is pending before the Appeals Division. If the Administrator makes an assessment of contributions due, any appeal taken would be to the Superior Court.

We do not perceive Conn. Gen. Stat. §§31-237j and 31-270 to be in conflict, but rather to be alternative procedural means to obtain a review of the Administrator's action. Unless the parties stipulate to alternative procedures, an appeal from an assessment under §31-270 will go directly to Superior Court, whereas all other determinations must be appealed through the two tiers of the Appeals Division before an appeal to court will be processed. In an appeal heard by a Referee pursuant to Conn. Gen. Stat. §31-237j(a), a party is provided with the due process protection of a full scale administrative hearing, including the opportunity to present testimony and documentary evidence, examine and cross-examine witnesses, and to make opening and closing arguments. Ultimately, however, a review by the Superior Court is available to any party aggrieved by a determination under the Unemployment Compensation Act.[5/]

In the case before us, First Federal filed an appeal from the Administrator's determination that it had succeeded to Suffield. This determination is a precursor to any determination that contributions as a successor to Suffield are due. First Federal is not deprived of its right to court review, but has been provided with an administrative hearing and further appeal rights on the successorship issue. The employer retains the right to appeal the successorship determination further to the Superior Court if it is aggrieved by the Board's decision, or to appeal any future assessment made by the Administrator directly to the Superior Court. We thus reverse the Referee's ruling on jurisdiction and conclude that the Appeals Division has jurisdiction to consider the matter before it pursuant to Conn. Gen. Stat. §31-237j(a).

III. FACTS.

On September 6, 1991, Suffield was declared insolvent by the Banking Commissioner of the State of Connecticut. By order of the Superior Court, the Federal Deposit Insurance Corporation (FDIC) was appointed receiver of Suffield. On that same day, First Federal entered into a Purchase and Assumption Agreement with the FDIC to purchase certain assets and assume deposits and other liabilities of Suffield.

The FDIC agreed to facilitate the transaction. According to the Purchase and Assumption Agreement, First Federal agreed to assume and discharge the liabilities of demand deposits, including outstanding cashiers and other checks, time and savings deposits, and any accrued and unpaid interest. First Federal acquired security interests, borrowings from the Federal Reserve Bank, ad valorem taxes applicable to acquired assets, and liabilities for securities, financial contracts, tax and loan note options. The Purchase and Assumption Agreement provides that First Federal purchased Suffield's:

(a) Cash and receivables from banks, including cash items in the process of collection, plus any accrued interest thereon computed to and including bank closing;

(b) Securities (excluding any securities issued by Chemical Bank (New York) and any capital stock) which are not adversely classified, plus any accrued interest thereon computed to and including bank closing, if any;

(c) Federal funds sold and securities purchased under agreements to resell, if any, including any accrued interest thereon computed to and including bank closing;

(d) Loans which: (i) are not adversely classified, are not more than 60 days past due and are not on a non-accrual basis, and (ii) are installment loans, 1-4 family mortgage loans fully secured by certificates of deposit and savings accounts or loans 90% or more guaranteed by the United States or an agency or subdivision thereof, including any accrued interest thereon, including any accrued interest thereon computed to and including bank closing;

(e) Qualified financial contracts;

(f) Credit card plans and other revolving credit plans, if any;

(g) Safe deposit boxes and related business, safekeeping business, and trust business.

First Federal also acquired records and other documents pertaining to deposit liabilities and transferred assets. The FDIC agreed to indemnify First Federal for any forged or stolen instruments. First Federal did not purchase institution bonds or insurance policies or premium refunds belonging to Suffield, nor did it acquire any interest, action or judgment against any employee of Suffield for acts or omission which occurred before the transfer under the Purchase and Assumption Agreement. First Federal did not acquire any prepaid regulatory assessments of Suffield, Federal Home Loan Bank stock, or any amounts of a loss reserve or contingency account.

The First Federal Bank published a notice that it had acquired the deposit accounts and certain assets of Suffield as of the close of business on September 6, 1991, that the former banking offices of Suffield were as of that date offices of First Federal, and that First Federal was looking forward to serving the customers of Suffield. The notice assured customers that, with office managers and employees from Suffield, the transition would be handled smoothly; that banking hours would remain the same; and that checks, ATM cards and passbooks could continue to be used. On September 12, 1991, First Federal sent a form letter to Suffield customers, advising then that, like Suffield, First Federal specialized in providing up-to-date personal financial services at competitive rates. The letter further provided that First Federal would strive to earn the customer's business, and requested that the customers ratify each account, either verbally or in writing, or by making a deposit, withdrawal, writing a check, updating a passbook, allowing a certificate of deposit to mature and be automatically renewed, allowing interest to be credited to another ratified account, or by pledging a certificate of deposit as a collateral for a loan from First Federal.

First Federal agreed to purchase or lease the premises of Suffield's branch offices, the furniture, fixtures and lease improvements. First Federal purchased two branch buildings and assumed the lease on three other branches. First Federal did not acquire Suffield's main office, the Brownstone Building in Hartford, or a building located in Glastonbury which housed operational processes. At the time of the Referee's hearing, First Federal occupied approximately 25 to 26 per cent of the space formerly occupied by Suffield. First Federal acquired fixtures and equipment valued at $274,600. First Federal also agreed to accept on assignment the licensing agreements for data processing. However, because First Federal had its own data processing department, it did not acquire data processing equipment or assume the computer support system contract which Suffield had maintained from an outside source. First Federal, with FDIC's cooperation, converted to its own computer systems and equipment as soon as possible after the Purchase and Assumption Agreement was executed.

First Federal committed itself to provide full-service banking in Suffield's trade area for a period of thirty days commencing on the first banking business day after Suffield closed. On September 7, 1991, the day after signing the Purchase and Assumption Agreement, First Federal opened for business at Suffield's former branch locations in Enfield, Windsor Locks, Suffield and East Windsor, Connecticut.

On September 6, 1991, one hundred and eighty-one Suffield employees were laid off. On September 7, 1991, First Federal hired forty-six former Suffield employees. It hired no senior management employees, officers, or employees who worked on operations or commercial loans, but hired tellers, branch managers and assistant managers. These employees were subsequently trained in First Federal's products and procedures.

First Federal assumed liability for all of the deposits formerly belonging to Suffield, and acquired the supporting records, such as passbooks and signature cards. This amounted to 24,821 deposit accounts, with an outstanding deposit liability of $248,836,453. First Federal also acquired $11,000,000 in securities, and loans held by Suffield valued at $2,300,000, as well as accrued interest on these loans. The value of the loans was less than one per cent of Suffield's total asset portfolio of $290,000,000.[67] FDIC retained the remainder of Suffield's asset portfolio, much of which was valued at less than the book value. First Federal acquired some safe deposit customers, but did not acquire any qualified financial contracts, any trust business, and only an insignificant amount of material relating to safekeeping and credit cards. First Federal did not acquire many of Suffield's commercial loans and did not acquire Suffield's commercial lending operation. First Federal currently maintains a much less extensive commercial lending operation than that formerly maintained by Suffield.

The FDIC paid First Federal approximately $249,000,000 in cash to accept the assets and liabilities to offset the difference between the value of the assets acquired and the value of the deposit liabilities. If the depositors did not ratify the accounts by making some affirmative action on their deposit accounts within eighteen months of First Federal's acquisition, the deposit accounts and corresponding cash was to be transferred back to the FDIC. Approximately thirty-seven per cent of the deposit business did not continue with First Federal. Only approximately ten percent of First Federal's individual depositors obtained a loan through First Federal. First Federal offered holders of Certificates of Deposit the same interest rates for fourteen days. Thereafter, First Federal offered its own interest rates and loan products, which varied from Suffield's in structure and in the method of computing interest earned. First Federal did not offer commercial checking accounts, which had been offered by Suffield.

IV. THE FDIC DOES NOT HAVE STANDING AS A PARTY TO THESE PROCEEDINGS.

On June 18, 1992, Referee Dearborn granted the motion made by the FDIC that it be made a party to these proceedings.

Section 31-241 of the Connecticut General Statutes provides that notice of a decision of eligibility following a claim for benefits shall be provided to the claimant and any employer against whose account charges may be made due to any benefits awarded by the decision. Pursuant to Conn. Gen. Stat § 31-225a(h)(1), any employer against whom benefit charges are to be allocated is an interested party. The Administrator is designated as a party to all proceedings before a Referee, the Board of Review, or a reviewing court. Conn. Gen. Stat. § 31-249c. The term "party" is defined in Conn. Agencies Regs. §31-237g-1(17) as the claimant whose unemployment compensation claim

is filed, any employer against whom charges may be made or tax liability assessed due to a decision and who has appealed that decision or for whom a claimant's separation is an issue, and the Administrator.

The issue in the case before us is whether First Federal succeeded to Suffield. Whether FDIC has any potential liability as a receiver for the insolvent Suffield for contributions due at the time of distribution or thereafter, pursuant to Conn. Gen. Stat. §31-267, is not at issue before us, nor is it relevant to a determination of whether First Federal succeeded to Suffield. Nor does the fact that assets, organization, trade or business were acquired indirectly preclude finding successorship or necessitate finding the intermediary to be a successor.[7] See Newco Lumber Co., Inc v. Administrator, 9007-BR-92 (Answer to Question Certified to the Board, 12/29/93).

Nonetheless, we recognize that the FDIC may be affected by the decision in this case, which is likely to have significant precedential value. Section 31-237g-11(f) of the Regulations of Connecticut Agencies provides that, under such circumstances, the Appeals Division may, upon its own motion or written request of another, permit such an entity which represents a constituency which would be affected by a decision to serve as amicus curiae representative for purposes of advocating the interests of the constituency or of availing the Appeals Division of its knowledge on the subject. While we conclude that the FDIC is not properly a party before the Appeals Division since it has no tax liability from the successor determination, we nonetheless acknowledge that it represents the interests of the federal government in protecting public funds and that it has specialized knowledge of the subject of the acquisition by First Federal, and thus rule that it is appropriately designated as amicus curiae representative.

By virtue of its designation as amicus curiae representative, the FDIC is entitled to the same notice with respect to the proceedings due to each party, but has no standing to exercise appeal rights with regard to this decision. Conn. Agencies Regs. §31-237g-11(f).

V. THE ADMINISTRATOR IS NOT PRECLUDED FROM DETERMINING THAT FIRST FEDERAL SUCCEEDED TO SUFFIELD SAVINGS BANK.

The FDIC maintains in its written argument that its regulatory and oversight powers arise from the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, P.L. 101-73, 103 Stat. 183 (FIRREA). By operation of 12 U.S.C. §1821(d)(2)(A), FDIC succeeded as receiver to Suffield. 12 U.S.C §§1821(c)(2)(c) and 1821(c)(3)(c) exempt the FDIC from direction or supervision from any agency of any State, and 12 U.S.C. §1825(b)(1) exempts the FDIC from taxation by any State. The FDIC thus contends that the Administrator is preempted from determining that First Federal succeeded to Suffield.

Federal law will preempt state law where there is a clear statutory prescription, where there is a direct conflict between state and federal law, or where there is a uniquely federal interest involved. Boyle v. United Technologies Corp., 487 U.S. 500, 108 S. Ct. 2510, 2514 (1988). We note that the question of preemption is one of federal law, arising from the supremacy clause of the United States Constitution. Our jurisdiction is

confined by the Unemployment Compensation Act and limited to its provisions, and it is the province of the judiciary, rather than that of the quasi-judicial Appeals Division, to consider the constitutionality of the Act. See Savage v. Aronson, 214 Conn. 256 (1990), see also Tufaro v. Pepperidge Farm, Inc., 24 Conn. App. 234, 235-236 (1991).

The Administrator has not directed, controlled, supervised or taxed the FDIC, nor does the Connecticut Unemployment Compensation Act prohibit the FDIC from taking any action it is authorized to take under federal law. Cf. Stoltz v. Wilmington Trust Co., Docket No. WL 12 7516 (Del. Ch. June 9, 1992), in which the Court of Chancery in Delaware found that a Delaware statute which prohibited the transfer of a letter of credit directly conflicted with the FIRREA provision contained in 12 U.S.C. §1821(d)(2)(G), that the FDIC could transfer any asset held by a failed bank, and concluded that the FDIC was exempt from the transfer restrictions.

In determining First Federal to be a successor employer, the Administrator has not subjected the FDIC to the Administrator's direction or supervision or imposed a tax in contravention of 12 U.S.C.§§ 1821(c)(2)(c) and (c)(3)(c) or 12 U.S.C.§ 1825(b)(1). The entity affected by the determination of successorship is First Federal, not the FDIC. First Federal may be subjected to additional costs of doing business as a result of its expansion by acquiring the assets and liabilities of Suffield, but these costs of doing business are not inconsistent with the public policies promoted by FDIC with regard to failed institutions. Furthermore, the Connecticut Unemployment Compensation Act is, in itself, a federally mandated program that provides the important objectives of promoting economic stabilization and providing for employment security.

The FDIC assumes that a determination that one entity succeeded to another will discourage banks with good experience ratings from assuming the assets and liabilities of an insolvent bank by imposing increased taxes, with resulting lower bids and losses to the deposit insurance fund. The FDIC contends that the application of Conn. Gen. Stat. §§ 31-223(a)(2) and 31-225a(i)(e) conflicts with its policy of encouraging Purchase and Assumption Agreements, and thus the Connecticut Unemployment Compensation Act directly and significantly conflicts with the specific objectives of the FDIC.

The FDIC's underlying assumption is is not accurate, since a successor may also succeed to a predecessor's more favorable tax rate, thus decreasing the resulting tax rate.[8/] Moreover, the imposition of successor liability should not be a disincentive to the continuity and stability of employment by discouraging banks from assuming the assets of failed institutions. The assets and deposit liabilities are assumed, and the acquiring bank agrees to provide banking services in the failed bank's trade area, with the expectation that the acquiring bank will find it profitable to expand into the trade area. Although it may well prove that the failed bank's employment record deteriorates prior to the transfer, particularly if all of the employees are not retained, an incentive exists for the acquiring entity to retain the predecessor's former employees in order to maintain a more favorable experience rating.

VI. FIRST FEDERAL DID NOT SUCCEED TO SUFFIELD BECAUSE IT DID NOT ACQUIRE SUBSTANTIALLY ALL OF SUFFIELD'S ASSETS, ORGANIZATION, TRADE OR BUSINESS.

Section 31-225a(i)(2) of the Connecticut General Statutes provides that "[t]he executors, administrators, successors or assigns of any former employer shall acquire the experience rating records of the predecessor employer...." In addition, Conn. Gen. Stat. §31-223(a)(2) provides that an "employer who acquires substantially all of the assets, organization, trade or business of another employer who at the time of such acquisition was subject to the chapter shall immediately become subject to the chapter as a successor employer."

1. The Acquisition of Assets, Organization, Trade or Business Through a Purchase and Assumption Agreement With the FDIC Does Not Preclude Finding That The Assuming Entity Succeeded To The Entity In Receivership.

In the case before us, FDIC was appointed receiver for Suffield by the Connecticut Superior Court on the same date that First Federal acquired some of the assets and trade or business of Suffield. Pursuant to Conn. Gen. Stat. §36-36(b), upon appointment of a receiver, possession and title to all assets, business and property of a state bank and trust company, savings bank, or savings and loan association passed to and vested in the receiver.[9/] On the same day and at essentially the same time, FDIC as the receiver transferred certain assets and liabilities to First Federal.

There is no contention by the Administrator that the FDIC is a successor employer, nor is there any attempt to impose any taxes on the FDIC in violation of 12 U.S.C. 1825(B)(1), which exempts the FDIC as receiver from any state, county, municipal, or local taxation except for real property held by the FDIC and tax imposed under the Internal Revenue Code of 1986. According to 12 U.S.C. § 1821(d)(2)(E), the FDIC succeeded to Suffield's title to all rights, title, books, records and assets. Pursuant to the corresponding Conn. Gen. Stat. §36-36(b), the receiver acquired all Suffield's assets, business and property. The FDIC immediately entered into the Purchase and Assumption Agreement, whereby it transferred a substantial number of Suffield's assets to First Federal. The FDIC did not retain all of Suffield's assets, organization or business except for a brief period between its appointment as receiver and the execution of the Purchase and Assumption Agreement. Furthermore, although Suffield's banking business continued uninterrupted, it was never operated by the FDIC. The acquisition of assets and business by the FDIC was of such brief duration that it did not result in any consideration by the Administrator of whether it succeeded for purposes of the Unemployment Compensation Act, notwithstanding the provisions of 12 U.S.C. §§ 1821(c)(2)(c) and 1821(c)(3)(c) that the FDIC not be subject to the direction or supervision of any state in the exercise of its rights, power and privileges.

Section 31-223(a)(2) of the Connecticut General Statutes provides that "[an] employer who acquires substantially all of the assets, organization, trade or business of another employer who at the time of such acquisition was subject to the Act shall immediately become subject as successor employer." This provision deals with employers not previously subject to the Act, and is distinct from the provision in Conn. Gen. Stat. §31-225a(i)(2) providing that an executor, administrator, successor or assign will acquire a predecessor's experience rating records. Even in Conn. Gen. Stat. §31-

223(a)(2), there is no statutory requirement that the acquisition be directly from the employer subject to the Act, only that the predecessor be subject to the Unemployment Compensation Act at the time of acquisition. We have previously noted that an indirect acquisition may result in finding successor liability. See Spongex Corporation v. Administrator, Board Case No. 698-87-BR (12/22/87), citing Taylor-Graves Inc. v. Unemployment Compensation Commissioner, 15 Conn. Sup. 402, 403 (1948), for the proposition that it is not the form but the substance of the acquisition which we are to consider.

The Board of Review has recently considered whether an employer can succeed to another through an indirect acquisition in Robert G. Ehlers v. Administrator, Board Case No. 9004-BR-91 (7/13/93). In Ehlers, the Board found that the acquisition of assets of an employer by several individuals, who within a week or two formed a corporation with the assets, did not insulate the newly formed corporation from successor liability. The intervening interest of the individual owners, who were the principals of the subsequently formed corporate employer, did not preclude a finding that the corporation succeeded to another employer subject to the Unemployment Compensation Act at the time of the acquisition..

In Newco Lumber Co., Inc. v. Administrator, Board Case No. 9007-BR-92 (Answer to Question Certified to the Board, 12/29/93), the Board considered whether an employer could succeed to another employer through another entity. The Newco Lumber Company purchased at a public auction secured assets repossessed by a bank after the prececessor defaulted on a loan. In Newco, we examined the broad language of the provision of §31-225a(i)(2) and concluded that the statute intended to impose the experience rating records of a predecessor on an employer which acquired the predecessor through any of a wide variety of direct or indirect transfers. We also examined the purpose of the provision, to protect employees against loss of compensation where the same business is substantially continued, although under another form. Harris v. Egan, 135 Conn. 102, 105 (1948). Section 31-225a(i)(2) was amended in 1976 to make the assumption of a predecessor's experience record mandatory in order to prevent employers from dissolving and then reforming under another name to evade an unfavorable tax rate. A survey of case law in other jurisdictions which we conducted in Newco reveals that the majority of jurisdictions found that successor liability could be incurred despite an acquisition through a third party, court assignment, or other intermediary.

The Purchase and Assumption Agreement between the FDIC and First Federal specifically provides that the agreement is governed by federal law and, in the absence of controlling federal law, the laws of the State of Connecticut. The Purchase and Assumption Agreement, whereby the receiver transfers certain assets and corresponding liabilities in the form of deposits to an assuming bank, is considered an effective and cost efficient way to protect depositors and the FDIC insurance fund. See FDIC v. Bank of Boulder, 865 F.2d 1134, 1136 (10th Cir. 1988). In furtherance of the federal policy aims of the FIRREA, the FDIC is authorized to reorganize insolvent depository institutions or transfer assets and liabilities to solvent banking institutions to promote banking practices which preserve the FDIC insurance fund and enhance the ability of the FDIC to deal with insolvent institutions. The Purchase and Assumption Agreement is considered a particularly desirable vehicle since it minimizes disruption in the banking industry, Stoltz v. Wilmington Trust Co., Docket No. WL 127516 (Del. Ch. Jun. 9, 1992); and avoids the spectre of closed banks and the

interruption of daily banking services. Gunter v. Hutcheson, 674 F. 2D 862 (11th Cir. 1982). In the case before us, First Federal agreed to and did provide full service banking in Suffield's trade area for at least thirty days.

First Federal relies on the case of Leiding v. Federal Deposit Insurance Corporation, 940 F.2d 1538 (10th Cir. 1991) for the proposition that First Federal did not succeed to Suffield. In Leiding, The Tenth Circuit Court of Appeals held in an unpublished decision that an assuming bank did not succeed to the failed bank with regard to the obligation to continue medical coverage under ERISA for a former employee of the failed bank. The court noted that the terms of the particular health plan provided that coverage ceased when the employer terminated the plan, that the failed bank had ceased operation and thus terminated participation in the plan, and the assuming bank had explicitly excluded in the Purchase and Assumption Agreement any obligations and responsibilities under the failed bank's employee benefit plans. The court proceeded to apply the definition of "successor employer" found in cases involving the NLRB and concluded that, even if ERISA and COBRA defined employer to include a successor employer, the assuming bank was not a successor.

Initially, the Tenth Circuit Rule 36.6 provides that, since the decision is unpublished, the opinion in Leiding has no precedential value. Furthermore, the court specifically limited its decision to the particular facts and the issue on appeal. Finally, and significantly, the definition of successor employer applied by the Tenth Circuit differs substantially from the definition of successor set forth in the Connecticut Unemployment Compensation Act.

The Tenth Circuit Court of Appeals in Leiding considered whether the assuming bank "acquired substantial assets of its predecessor's business and continued, without interruption or substantial change, the predecessor's business operations," and concluded that the failed bank had ceased doing business and was liquidated, and thus underwent serious interruption and substantial change. Id. at 4, citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S 27 at 43. The inquiry under the Connecticut Act, on the other hand, is not whether there has been an acquisition without interruption or substantial change to the failed bank's business operation, but whether the assuming bank acquired substantially all of the assets, organization, trade or business of another employer which at the time of the acquisition was subject to the Unemployment Compensation Act. Conn. Gen. Stat. §31-223(a)(2). The provision is in the alternative and an employer must meet only one of the criteria to be held a successor employer. Harris v. Egan, 135 Conn. 102, 105, 60 A.2d 922 (1948). Although the acquisition of a trade or business contemplates the continuation of the business as a going concern, see Granger Group, Inc. v. Administrator, Board Case No. 33-82-BR (4/21/88), an employer is considered to have succeeded to another if it acquired the capacity to carry on the business through the acquisition of substantially all of the assets, whether or not it chooses to continue the business as it had been conducted by the predecessor. See Sounder International, Inc. v. Administrator, Board Case No. 671-BR-88 (10/3/88). For the foregoing reasons, we do not consider the opinion in Leiding to be controlling.

First Federal maintains that it could not succeed to Suffield because all of Suffield's assets and liabilities passed to the FDIC and that only certain named assets and liabilities listed in the Purchase and Assumption Agreement, which did not include Suffield's experience rating, were thereafter acquired by First Federal. We are aware of the case of Payne v. Security Savings and Loan Assn., 55 FEP 96, 98 (7th Cir. 1991), in which the Seventh Circuit United States Court of Appeals held that the Resolution Trust Corporation (RTC), as receiver, succeeded to a wrongful discharge action brought against a failed bank, and not the subsequent purchaser, because the RTC had not expressly designated otherwise. The court relied on the provisions of 12 U.S.C. §1821(d)(2)(H), that the RTC was legal receiver of "all valid obligations of the insured depository institution" and concluded that the RTC succeeded to the failed bank's liabilities and that the RTC was authorized to transfer only those assets and liabilities which it deemed appropriate. Since the Purchase and Assumption Agreement failed to include liability for damages awarded as a result of the litigation, in which the former employee had prevailed but the issue of damages was still pending at the time of RTC's appointment, RTC and not the subsequent purchaser was held to be the successor to the liability at issue.

A predecessor's experience rating records, unlike a cause of action or a judgment, is not a negotiable asset or liability belonging to the predecessor. The experience history is not an interest which attaches to property ownership so as to cloud its title, In re Wolverine Co. and MESC v. Wolvering Radio Company, Inc., 930 F.2d 1132 (1991), and it is not subject to the predecessor's intent with regard to its disposition. Rather, it is a record, a reflection of the employer's employment experience, maintained by the Administrator as required by Conn. Gen. Stat. §31-222(b)(1), of benefits paid to individuals allocated and charged against an employer's account from which a benefit ratio is calculated as a ratio of charges to the total of taxable wages reported during the same period. The assumption of the predecessor's experience rating record by a successor is mandated by operation of Conn. Gen. Stat. §31-225a(i)(2). This provision is part of a comprehensive federal-state system for providing for the security of unemployed workers. The Connecticut Unemployment Compensation Act has been certified as being in compliance with the Federal Unemployment Tax Act (FUTA) for an experience-based tax rate. See 26 U.S.C. §3301, et seq. The holding in Payne is distinguishable, since it involved liability for a cause of action against the predecessor which arose prior to the RTC being appointed receiver. A successor determination under the Unemployment Compensation Act, on the other hand, is made after the transfer of assets and never attached to the FDIC. Thus, the failure of a Purchase and Assumption Agreement to specifically include the experience rating record does not prevent a successor employer from acquiring the experience rating record.

Moreover, the Purchase and Assumption Agreement between the FDIC and First Federal provided that First Federal agreed to discharge the listed liabilities, except as otherwise provided in the document. The agreement specifically excluded any obligation or responsibility for employee benefit plans, including medical insurance, vacation, pension, profit sharing or stock purchase plans, if any, unless the receiver and First Federal subsequently agreed otherwise. The Purchase and Assumption Agreement did not address obligatory programs such as workers' compensation, unemployment compensation or social security. The Agreement did, however, provide that

First Federal would perform all obligations with respect to state and federal income tax reporting and further provided that the agreement, rights and obligations are to be governed in accordance with federal law and, in the absence of controlling federal law, the laws of the State of Connecticut. Even if, arguendo, an employer could contractually preclude the transfer of a predecessor's experience record, the Purchase and Assumption Agreement does not specifically contemplate the failed bank's experience rating record in its language. Rather, the broad contractual language directing that, in the absence of controlling federal law, the Purchase and Assumption Agreement be construed according to State law, would support a finding that the parties contemplated the applicability of the Connecticut Unemployment Act and anticipated the obligations under the Act of certain business activity by a qualified employer. Thus, we conclude that the failure of the Purchase and Assumption Agreement to specifically refer to the acquisition of the predecessor's experience rating record does not prevent a successor employer from acquiring the experience rating record.

Where a successor employer acquires substantially all of the assets, organization, trade or business of another, the rating account of the business will transfer to the successor employer as a result of the operation of the statutory formula, without regard to whether the consequences are favorable or unfavorable or whether the assets were acquired pursuant to a Purchase and Assumption Agreement. We thus conclude that an acquisition through an FDIC Purchase and Assumption Agreement does not preclude our finding that an assuming bank succeeded to the failed bank.

2. First Federal Did Not Acquire Substantially All of the Assets, Organization, Trade or Business of Suffield.

Pursuant to Section 31-223(a)(2) of the Connecticut General Statutes, "an employer who acquires substantially all of the assets, organization, trade or business of another employer who at the time of such acquisition was subject to this chapter shall immediately become subject to this chapter as a successor employer." The Connecticut Supreme Court considered the successor-in-interest provision in 1948, holding that the test was to be applied in the alternative and that an employer must meet only one of the three criteria to be considered a successor employer. Harris v. Egan, 135 Conn. 102, 105, 60 A.2d 922 (1948).

The first test for a successor-in-interest is whether the employer acquired substantially all of the assets of the predecessor. We do not apply a rigid, mechanical test to determine whether substantially all of the assets have been acquired, but consider tangible and intangible assets including but not limited to equipment, machinery, land, buildings, office equipment, name, good will, customer lists and outlets, methods of production, lines of commodity, patents, trade marks, licenses, records of accounts, management and employment contracts, accounts receivable and payable, covenants not to compete, good will, work in progress, and other valuable assets. See Spongex Corp. v. Adminstrator, Board Case No. 698-87-BR (12/22/87). In determining what constitutes substantially all of the assets, we consider all assets but weigh more heavily those assets which contribute to the employer's capacity to operate as a going business capable of employing workers. See MacKenzie Service Corp. v. Administrator, Board Case No. 701-BR-88 (9/16/88); Graphic Image, Inc. v. Administrator, Board Case No. 9003-BR-92 (12/21/92).

In the case before us, First Federal acquired 2.3 million or approximately one per cent of Suffield's outstanding loan portfolio; eleven million dollars in securities; and fixtures and equipment valued at $279,600. First Federal also purchased two of four buildings formerly owned by Suffield and acquired three leasehold interests, the value of which is not in the record. The deposits, technically a liability, have some value as potential sources of continued deposits. There is also some good will acquired since, although Suffield was declared insolvent, due to the action of the FDIC the public retained confidence in the banking system as evidenced by a sixty-three percent ratification rate. However, First Federal did not acquire the majority of Suffield's loan portfolio or the commercial loan business. Although First Federal obtained a substantial funding source through the FDIC's cash transfer, this cash did not come from Suffield but from the FDIC insurance fund. Thus, First Federal has not been shown to have acquired substantially all of Suffield's $290,000,000 in assets.

Another prong of the successor-in-interest test is whether there has been an acquisition of the organization of the predecessor, or the vital, integral parts necessary for continued operation. The organization is the management component of the business, the component responsible for directing and administering the operation. See Spongex v. Administrator, Board Case No. 698-87-BR (12/22/87). In the case at hand, First Federal hired some of Suffield former branch managers and assistant managers, or some of Suffield's middle management. However, First Federal did not acquire any senior management personnel, and thus we cannot find that First Federal acquired substantially all of Suffield's organization.

The final prong of the successor-in-interest provision is whether there has been an acquisition of the trade or business of the predecessor. This test contemplates the continuation of a business as a going concern, and requires consideration of the nature of the assets transferred, whether there is continuity of management and employees, whether there was been a transfer of the market clientele, whether there has been an interruption of the business as a going concern, whether there is a similarity in procedures for the conduct of the business, and whether the acquiring entity acquired the capacity to continue in the same business. See Granger Group v. Administrator, Board Case No. 33-82-BR (1/20/88). The nature of the assets acquired may be critical. In Androski v. Credit Bureau of Ansonia, Board Case No. 220-BR-88 (4/14/88), we concluded that the successor employer had acquired the trade or business of the predecessor when it acquired the market or clientele of the predecessor, including the four major active accounts, and continued the predecessor's employment capacity by continuing in the same business as the former employer. We found evidence of acquisition of the trade or business in the successor's offer to hire all of the predecessor's former employees and in its continuing to offer the predecessor's clients the collection service without interruption. In another case, we found that the successor's acquisition of customer lists, its hiring key and other employees, and its acquisition of mechanicals, client lists and accounts receivable to be evidence of the successor's acquisition of the capacity to carry on the trade or business. Sounder International, Inc. v. Administrator, Board Case No. 671-BR-88 (10/2/88); see also Graphic Image, Inc. v. Administrator, Board Case No. 9003-BR-92 (12/21/92).

The FDIC is an instrumentality created by the United States Congress to promote and maintain stability in the nation's banking system by insuring bank deposits. When an insured bank fails and the FDIC is appointed receiver, the FDIC has a number of options, including closing the bank and liquidating the assets and paying depositors their insured amounts. Gunter v. Hutcheson, 674 F.2d 862, 865 (11th Cir. 1982), cert. denied, 459 U.S. 826 (1982); Langley v. FDIC, 484 U.S. 86, 108 S. Ct. 396, 98 L.Ed. 2d 340 (1987). To avoid the problems associated with liquidation, including lost jobs, frozen accounts, checks returned unpaid, and disruption of the financial machinery, the Purchase and Assumption Agreement is considered a dramatically effective and cost efficient way to protect depositors, the banking system and the resources of the insurance fund, and will be preferred if it is the least costly method to the insurance fund. In a Purchase and Assumption Agreement, the assuming bank purchases the failed bank, assuming deposits and other liabilities, and immediately reopens the failed bank without interruption in banking operations and without loss to depositors. See Federal Deposits Ins. Corp. v. Bank of Boulder, 865 F.2d 1134 (10th Cir. 1988). The efficiency and effectiveness of the Purchase and Assumption Agreement requires that the agreement be consummated with great speed to avoid any interruption in banking services and to preserve and realize a valuable asset that would otherwise be lost, the going concern value of the bank. Federal Deposit Ins. Corp. v. Bank of Boulder, supra, at 1137.

To make a Purchase and Assumption Agreement attractive, the assuming bank need purchase only those assets which are of the highest banking quality, or "acceptable" assets. When the assumed liabilities exceed the value of the assets purchased, the FDIC, as receiver, agrees to pay the assuming bank the difference in cash, less a credit for the going concern value of the failed bank. Federal Deposit Ins. Corp. v. Bank of Boulder, supra. The FDIC is thus able to minimize its loss as a result of the bank's insolvency, the purchasing bank receives a new investment and expansion opportunity at low risk, and the depositors of the failed bank are protected from the closing and liquidation procedure. See Stoltz v. Wilmington Trust Co., Docket No. WL 127516 (Del. Ch. Jun. 9, 1992).

In the case before us, First Federal made a bid to the FDIC and entered into the Purchase and Assumption Agreement after studying Suffield's assets. First Federal based its decision on its projections which led it to believe that it was a wise business decision. First Federal agreed to accept the deposit accounts held by Suffield depositors with the expectation that a substantial number of the depositors would ratify their accounts and continue as deposit customers with First Federal. First Federal issued notices and sent letters to the depositors urging them to continue their banking with First Federal. First Federal initially acquired all of the deposit accounts, considered liabilities because they are debts owed to depositors, and ultimately retained approximately sixty-three percent of the deposit business. We thus agree with the Administrator's analysis that First Federal acquired all of Suffield's deposit business.

There is, however, another aspect to the business of banking, that of investing the funds provided by depositors in the expectation of earning a greater return on the investment than owed as interest to the depositors. The funds from Suffield depositors were not transferred to FDIC or to First Federal, but were utilized by Suffield in making loans and other investments. FDIC acquired the loans as receiver, but transferred only a small percentage of the loans to First Federal because most of the loans were not considered "acceptable" assets. Instead, the FDIC gave First Federal cash from the insurance fund to induce First Federal to accept Suffield's deposit liability.

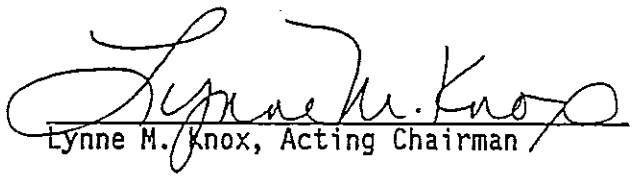
Most of Suffield's loans, for the most part commercials loans made through Suffield's commercial loan operations, were never acquired by First Federal. First Federal concentrates primarily on residential loans and does a much less extensive commercial loan business than Suffield. The vast majority of Suffield's loans were not transferred, nor was the commercial loan business acquired. Only approximately ten per cent of First Federal individual depositors ever become borrowers; therefore, even by acquiring all of the deposit business, First Federal did not acquire the substantial loan or investment business. The $249,000 in cash that First Federal acquired came from the FDIC insurance fund and not from Suffield.

Since First Federal did not acquire most of the income generating portion of Suffield's trade or business, we do not find that the Administrator has met his burden of proving that First Federal acquired substantially all of Suffield's trade or business.

VII. CONCLUSION.

Because we find that First Federal has not been shown to have succeeded to Suffield, the Administrator's determination of successor liability is reversed, and First Federal's appeal is sustained. In so ruling, the Board has made the factual findings recited in Section III above.

BOARD OF REVIEW



Lynne M. Knox, Acting Chairman

In this decision Board member Patrick Quinn concurs. Board member Glenn Williams concurs only in the ultimate conclusion in this case that First Federal did not acquire substantially all of the assets, organization, trade or business of Suffield Savings Bank.

LMK:SSW:fjc

IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY JUNE 10, 1994. SEE LAST PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL RIGHTS.

FOOTNOTES

1/ In its August 26, 1993 motion to the Referee to reopen the matter and issue a decision on the merits of its appeal, the employer contended that it filed a timely appeal pursuant to Conn. Gen. Stat. §31-237j from the Administrator's determination of successor liability, that the appeal was properly before the Referee, and that the Referee should thus hear and decide its appeal. The employer maintained in its motion that Conn. Gen. Stat. §31-270 is not applicable. The Referee did not rule on the employer's motion since the Board granted the Administrator's motion to transfer the case to the Board. We note that the employer has taken the same position in regard to the Referee's jurisdiction over the matter as the Administrator.

2/ Section 31-222-7 of the Connecticut Agencies Regulations provides that payment of contributions is due the last day of the month next following the close of each calendar quarter, or the next business day if the contribution date falls on a Sunday or holiday. An employer who fails to pay its contribution within fifteen days after the due date of the contribution may, at the Administrator's option, become liable to pay succeeding contributions on a monthly basis.

3/ The procedure for determining an employer's assessment is fairly complex. The Administrator is to determine the charged tax rates for qualified employers as of each June thirtieth by calculating the benefit ratio. Conn. Gen. Stat. §31-225a(e)(1). A "qualified employer" is defined by Conn. Gen. Stat. §31-225a(a) as an employer subject to the Unemployment Compensation Act whose experience record has been chargeable with benefits for at least one full experience year, excluding employers subject to the flat entry rate of contributions, employers subject to the maximum rate pursuant to Conn. Gen. Stat. §31-273(c), and reimbursing employers.

The charged tax rate is determined as of each June thirtieth for the preceeding tax year by calculating a benefit ratio for each qualified employer. The benefit ratio is the quotient of the total amount chargeable to the employer's experience account [a record maintained for each employer of any benefits paid to an individual which have been allocated and charged to the account of the employer as a base period employer, which is based on a ratio of wages paid by the subject employer to total wages paid by all base period employers. Conn. Gen. Stat. §31-225a(b)(1)] divided by the total amount of taxable wages reported paid by the employer during the experience period, or three consecutive experience years ending on the computation date. Conn. Gen. Stat. §225a(a). The quotient, expressed as a per cent, constitutes the employer's charged tax rate. Conn. Gen. Stat. §31-225a(e)(1).

A contributing employer will be assigned a percentage rate of contributions based on the sum of the employer's charged tax rate and the fund balance tax rate. Conn. Gen. Stat. §31-225a(g). The contributions are assessed on reported wages. Each employer is required to submit a quarterly report of wage information and pay contributions for wages paid on at least a quarterly basis. Conn. Gen. Stat. §31-225a(j); Conn. Agencies Regs. §§31-223-7 and 31-222-8. Contributions become due on the last day of the month next following the close of each calendar quarter, and become delinquent fifteen days beyond the due date. Conn. Agencies Regs. §31-222-7.

4/ In McKinney v. Jacqueline's Nursing Service, Board Case No. 1177-86-BR (11/12/86), the Board noted in dicta that Conn. Gen. Stat. §31-237(a) did not apply to tax appeals in which there is no issue of chargeability related to a claim of a particular claimant.

The case involved the Administrator's determination that a claimant was an employee of Jacqueline's Nursing Service and not an independent contractor, and a subsequent determination that Jacqueline's was subject to a tax assessment for taxes due on wages paid to the claimant and other employees. The employer appealed from the notice of potential liability and "to the extent that they are subject to appeal at this time" the tentative findings and assessment of the other individuals determined to be employees. The Administrator had not officially issued the tax assessment, waiting until the determination of the claimant's status became final.

The Administrator later determined that the claimant voluntarily left her employment under disqualifying circumstances and relieved the employer of charges for the claimant. The Board, which had transferred the case to itself, dismissed the case, rejecting the employer's contention that it had jurisdiction under §31-237j(a) to hear its appeal from the tax assessment. Rather, the Board found that the tax assessment had not been officially issued, and any appeal from the tax assessment must be made pursuant to Conn. Gen. Stat. §31-270.

The Board's statement that it needed a chargeability issue to find jurisdiction was dicta made in the context of a tax assessment arising from a determination that an individual was engaged in employment subject to the chapter, and the Administrator's subsequent application of that determination on wages paid to the claimant and other similarly situated individuals to assess the employer with a contribution. This statement is overly broad, and is not accurate. See Administrator v. Wakeman-Walworth, Inc., Board Case No. 2-TBR-87 (8/2/89).

5/ We recognize that a different standard of review exists in those cases appealed pursuant to Conn. Gen. Stat. §31-270, in which the parties have not stipulated to administrative review, in that the court may, on the basis of evidence submitted to it or received by it, determine the facts if it concludes that the Administrator's findings are not supported by the record. See Beaverdale Memorial Park, Inc. v. Danaher, 127 Conn. 175 (1940). In its review of a case processed pursuant to Conn. Gen. Stat. §31-237j(a), the court will remand the case to the Appeals Division if it determines that the facts are not supported by the record. See, e.g., United Parcel Service, Inc. v. Administrator, 209 Conn. 381 (1988).

6/ The figures that First Federal utilized at the Referee's July 2, 1992 hearing vary from the figures contained in the attachment to Purchase and Assumption Agreement submitted by the FDIC with its memorandum of law. See Schedule 3.1, which indicates that the assets purchased, including cash due, federal funds, U.S. Treasury Securities, U.S. Agency securities and mortgage backed securities, amount to approximately $25,781,000; that First Federal assumed $52,711,000 in loans for a total of $80,283,000 in assumed in assets; and that the cash from the FDIC amounted to $176,165,000, for a total in transferred assets of $256,448,000. This figure was offset in schedule 2.1 by a total deposit liability amount of $256,448,000.

7/The majority of jurisdictions which the Board has surveyed appear to recognize that successor liability may result from acquisitions occurring at the time of bankruptcy, foreclosure, or insolvency of a predecessor. See Newco Lumber Co., Inc. v. Administrator, Board Case No. 9007-BR-92 (Answer to Question of Law Certified By Referee, 12/29/93). To be considered a successor for purposes of the Connecticut Unemployment Compensation Act, an entity must acquire substantially all of the assets, organization, trade or business, and thus it may necessary to examine the nature of the transfer from an intermediary to determine whether the provision is applicable.

8/Although the FDIC maintains that the assuming bank will have a lower tax rate than predecessor, this is not necessarily so. The tax rates of the predecessor and the successor will be merged. The experience record of the predecessor may have deteriorated as a result of the insolvency. However, it may be difficult to project how the merger will affect the acquiring entity as the rate is calculated as an annual basis.

9/The employer has maintained that, pursuant to Conn. Gen. Stat. §36-117a, First Federal could not succeed to Suffield because the right of a savings bank to conduct the business for which it is organized is not transferable, and is "forfeited when such institution voluntarily ceases the conduct of the business for which it was organized." (Emphasis added.) This provision appears to apply to the voluntary cessation of business, while the situation of an acquisition by a court ordered receiver is governed by Conn. Gen. Stat. § 36-36(b). See Conn. Gen. Stat. § 36-145. See also Conn. Gen. Stat. § 36-54, which also provides that the right of a state bank and trust company to conduct the business for which it was organized is not transferable and is forfeited when the institution voluntarily ceases the conduct of business except if the state bank and trust company becomes a national bank and continues the business for which it was organized.

COPIES OF THIS DECISION PROVIDED TO:

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(7/90)

NOTICE OF APPEAL RIGHTS

This decision shall become final on the thirty-first (31st) calendar day after the date of mailing unless, before that date, a party either appeals this decision to the Superior Court for the Judicial District of Hartford-New Britain or for the Judicial District in which the appealing party resides, or moves the Board to reopen, vacate, set aside or modify the decision. The appeal or motion may be mailed to the Employment Security Board of Review, 200 Folly Brook Boulevard, Wethersfield, Connecticut 06109, or filed in any unemployment compensation office for forwarding to the Board. PLEASE NOTE: to be timely filed the appeal or motion must be actually received at any such office no later than the thirtieth (30th) calendar day after the date of mailing of this decision or must bear a legible United States Postal Service postmark indicating that it was entrusted to the Postal Service within such thirty-day period. Postmarks attributable to private postage meters are not acceptable. Neither the Superior Court nor the Board can entertain an untimely appeal or motion unless the appealing party can show good cause for failing to file the appeal or motion on time. Therefore, if your appeal or motion is late, you should indicate why.

Any appeal or motion should list the following identifying information contained on this decision: the case number; the claimant's name, address and social security number; and the employer's name, address and registration number.

An appeal to Superior Court should be titled "Appeal to Superior Court," should consist of an original plus five (5) copies, and should state the grounds on which Superior Court review is sought. Appeals to Superior Court must be first filed with the Board in order that the file records can be certified to the Court. Appeals must NOT be sent directly to any Superior Court.

A motion to the Board to reopen this decision should be specifically titled as such. A copy of each motion should be delivered or mailed to each other party, including the Administrator, and the attorney or authorized agent of record for such party, no later than the date that the motion is filed with the Board. The last page of each motion should contain a statement describing how and when copies were supplied to the other parties. The Administrator's copy of the motion should be sent to: Administrator's Appeals Representative, Connecticut Labor Department, Employment Security Division, 200 Folly Brook Boulevard, Wethersfield, CT 06109. Each motion should describe the reasons for the motion and, if new evidence is alleged as a reason, the following should be further specified: the identity and importance of the new evidence and the reason why the evidence was not presented at the hearing previously scheduled.

CE 3-CU

TAX - "ABC" Test

BR-1
(2-88)

STATE OF CONNECTICUT
Department of Labor
Employment Security Appeals Division
Board of Review
200 Folly Brook Blvd.
Wethersfield, Ct. 06109

#2
PRECENTIAL
Independent contractor. Status as employee under "ABC" test Conn. Gen. Stat. § 31-222(a)(1)(B)(ii)

Good Guide to "ABC" Test

RECEIVED
DEC 28 1988
EMPLOYMENT SECURITY
APPEALS DIVISION
AREA D

IMPORTANTE - TENGA ESTO TRADUCIDO INMEDIATAMENTE - TIEMPO LIMITADO PARA APELAR

Claimant's Name, Address & S.S. No.

Rosella Feshler
441-39 S Main St.
Manchester, Ct. 06040

cc: Joan Benedict
128 Rosemary Lane
South Windsor, Ct. 06704

Board Case No: 995-BR-88

1. Appeal from Referee's determination
dated: September 2, 1988
Case No: 2643-A-86

2. Date appeal filed: September 23, 1988

3. Appealed by: Employer

4. Date mailed to interested parties:
December 27, 1988

Employer's Name, Address & Reg. No.

Hartford Dialysis
c/o Hartford Hospital
CCU 417
Hartford, Ct. 06106
Attn: Mark Izard
ER# 91-243-17

cc: D. Anderson, Esq.
c/o Murtha, Cullina, Richter & Pinney
Cityplace
P.O. Box 3197
Hartford, Ct. 06103-0197

cc: B. Zitser Esq
241 Main St.
Hartford, ct.

D. Metz Jr. & E. Polomsky
Field Audit Unit

DECISION OF THE BOARD OF REVIEW

Provisions of the Connecticut General Statutes involved:
Section 31-222(a)(1)(B)(ii).

CASE HISTORY - SOURCE OF APPEAL:

By a decision issued on October 1, 1986, the Administrator ruled that the appellant, Hartford Dialysis, was an employer within the meaning of the Unemployment Compensation Act.

The appellant appealed the Administrator's decision on October 21, 1986.

Appeals Referee William M. Mulholland affirmed the Administrator's ruling by a decision issued on September 2, 1988.

The appellant appealed the Referee's decision to the Board of Review on September 23, 1988.

DECISION

Acting under authority contained in Section 31-249 of the Connecticut General Statutes, the Board of Review has reviewed the record in this appeal, including the tape recording of the Referee's hearing.

The appellant has appealed from the Referee's decision of September 2, 1988, which affirmed the Administrator's determination that two claimants, Rosella Feshler and Joan Benedict, were employees of the appellant, Hartford Dialysis. The Referee concluded that the appellant exercised general direction over the work practices of the dialysis staff nurses and that the service which the nurses provided was covered employment.

In support of its appeal, the appellant contends that for more than two decades Hartford Dialysis and the dialysis nurses have considered the nurses to be self-employed independent contractors based on the nurses' independence in delivering their services. The appellant maintains that Hartford Dialysis operates primarily as a conduit to facilitate billing for the physicians and nurses who provide dialysis treatments and that it does not employ the nurses. The appellant further maintains that the nurses control their own schedules and working arrangements and perform their services without daily supervision by the appellant and, therefore, are not under the control and direction of Hartford Dialysis.

The record reveals that Hartford Dialysis has entered into an agreement with Hartford Hospital to administer, manage, and supervise dialysis services at Hartford Hospital. Hartford Dialysis employs a bookkeeper, clerical personnel, a head nurse, and an assistant head nurse for this purpose. Hartford Dialysis also engages a number of registered nurses who are to perform the dialysis procedures. Hartford Dialysis pays the dialysis nurses a fee, set by Hartford Hospital, for each dialysis procedure initiated. Under the terms of the agreement with Hartford Hospital, Hartford Dialysis is reimbursed for the fee paid the nurses by Hartford Hospital, which holds the required Medicare provider number and which, in turn, obtains Medicare or third party funding. No vacation, holiday, sick pay, or other fringe benefits are provided. No social security withholding or F.I.C.A. taxes are deducted from the fees paid to the nurses. A 1976 Internal Revenue Service technical advice memorandum concluded that the relationship of the dialysis staff nurses with Hartford Dialysis is that of independent contractors for purposes of the federal employment tax.

The nurses retained to perform the dialysis procedures are registered nurses with specialized training, provided for the most part by Hartford Dialysis. Approximately thirty nurses provide treatment, both on a chronic and acute basis. Patients receiving chronic dialysis treatments are scheduled in advance, while patients needing to be dialyzed on an emergency basis are handled through an on-call mechanism. At least two nurses are on call on a rotating basis at all times for this purpose. Chronic patients are generally scheduled for treatment by the head nurse. Nurses are responsible

for the setup, treatment, and cleanup of two patients during each shift. The time required to administer the treatment may vary greatly but averages three to five hours per treatment. Three shifts with approximate starting times are scheduled each day, and the nurses have flexibility among themselves to decide which shift and how many shifts they will work. Through an organization of nurses known as the Hemodialysis Council, the nurses have also established policies regarding coverage for vacations and illness. Nurses are permitted to switch scheduled shifts among themselves although they are generally responsible for an assigned shift. The arrangement to work with Hartford Dialysis is not exclusive, and the nurses may work elsewhere. However, the record reveals only one occasion on which a Hartford Dialysis nurse performed dialysis service elsewhere. In this instance a nurse worked at a summer camp during her two-week vacation.

Dialysis procedures are performed on the premises of Hartford Hospital, primarily in the dialysis unit. Procedures are also performed in other units of the hospital, such as intensive care and the emergency room. Specialized equipment owned and maintained by Hartford Hospital is employed for the treatment. Hartford Dialysis has established standing orders, encompassing state and federal requirements, to govern the conduct of the procedures. The nurses are required by state law to wear isolation attire, which is provided them without cost, and to submit to regular physical examinations and blood testing. Pursuant to a requirement by the state that personnel files be kept on the dialysis nurses, the nurses have filled out applications for employment with Hartford Hospital. Most of the nurses, who have been associated with Hartford Dialysis for many years, filed the applications long after they had begun working.

Employment subject to the provisions of the Unemployment Compensation Act means any service by:

> [A]ny individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Conn. Gen. Stat. § 31-222(a)(1)(B)(ii). It is a well settled canon of statutory construction that a general rule is to be broadly construed while the exception to the rule is strictly construed against the party who claims benefit of the exception. The party claiming the exception has the burden of proving that it comes within the limited class for whose benefit the exception was established. Conservation Commission of Town of Simsbury v. Price, 193 Conn. 414, 479 A.2d 187 (1984). The language of § 31-222(a)(1)(B)(ii) (the "ABC" test), which provides that services will be deemed employment unless and until the three part exception is established, further reinforces this concept. The exception is in the conjunctive, requiring that all three parts of the test be satisfied before an individual's services will be exempted from employment. The legislature clearly went beyond the common law independent contractor test (reflected in part A of the exception) when it enacted this definition of employment in 1971. See 1971 Conn. Acts 835 § 1. See also F.A.S. International v. Reilly, 179 Conn. 507, 427 A.2d 392 (1980). Unless a party satisfies all three prongs of the test, an employment relationship will be found where services are provided. In the case before us, the appellant Hartford Dialysis has not met its burden of proving that the dialysis nurses' services fall within the narrow exception to the definition of employment, and we are compelled to conclude that the nurses are employees within the meaning of the Unemployment Compensation Act.

The appellant has relied in part on an Internal Revenue Service technical advice memorandum dated January 14, 1977, which concluded that an employer-employee relationship does not exist between the taxpayer and the nurses for federal employment tax purposes. That ruling reasoned that the nurses were not employees, based on recited facts, under what is essentially part A, the common law independent contractor test, of the "ABC" test. The ruling is therefore, based on different criteria than those set forth in § 31-222(a)(1). Moreover, we disagree with the conclusion reached in the ruling. However, since the analysis under Part A of the ABC test is fairly complex, we will defer discussion under part A until we have examined the parties' relationship under Parts B and C of the statute.

Pursuant to Conn. Gen. Stat. § 31-229(a)(B)(ii) (II), service is employment unless "such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed." The appellant has maintained that the dialysis nurses do not perform their services for Hartford Dialysis at Hartford Dialysis' place of business, but perform services for dialysis patients on the premises of and using the equipment owned by Hartford Hospital.

The appellant's theory is not supported by the terms of the memorandum of understanding between Hartford Hospital and Hartford Dialysis, dated August 28, 1985, which provides that Hartford Dialysis will provide "medical administration, supervision, and management for all hemodialysis and peritoneal dialysis procedures in Hartford Hospital." Further, "Hartford

Dialysis will engage sufficient and competent personnel to staff the Hartford Hospital Hemodialysis and Dialysis Home Training Units and provide this service to patient-care units, in the hospital, when requested." By the terms of this contract, signed by Dr. Mark Izard, Director of Hartford Dialysis, Hartford Dialysis agreed to engage the staff and provide supervision of the dialysis services for the benefit of Hartford Hospital.

The appellant contends that the nurses provide their services directly to the patients, pointing out that when dialysis technology was developed in the early 1960's, private duty nurses were retained to assist physicians in conducting the procedure. These nurses would bill the patients directly. Along with the advent of chronic dialysis treatment and the involvement of third party funders and Medicare, state and federal regulations were promulgated to ensure conformity by licensed providers with certain standards. The nurses themselves began to perform the dialysis procedures. Hartford Dialysis developed a team of highly trained specialists in dialysis who were available for the twenty-four hour, seven day a week coverage necessary to provide acute and chronic dialysis service at Hartford Hospital.

Only licensed service providers, such as Hartford Hospital, can provide dialysis service. See letter from John H. Stewart, Assistant Director of Hartford Hospital, to Dr. Izard (Oct. 25, 1973), which, in establishing the fees to be paid to Hartford Dialysis for hemodialysis service provides: "If the medicare authorities, Blue Cross, a welfare department or any other third party payor, declines to pay the full charge made by Hartford Hospital, the fee paid to Dialysis Associates shall be reduced so that Hartford Hospital is paid the full cost of the services it renders." This document, which has long since been rescinded, nonetheless reflects the original understanding between the parties that Hartford Hospital was contracting with Hartford Dialysis (then known as Dialysis Associates) to provide the service to Hartford Hospital. Hartford Dialysis was, in turn, to engage the services of the dialysis nurses. The services provided by the dialysis nurses are precisely the "usual course of business" of Hartford Dialysis.

The appellant further maintains that since the services are not performed in the office of Dr. Izard, the nurses' services are not performed at a place of business of Hartford dialysis. The services were performed on the premises of Hartford Hospital, which Hartford Dialysis does not own or lease but has contractually agreed to direct and manage. This situation can be distinguished from that of a surgeon utilizing an operating room, an analogy made by the appellant, since the surgeon is generally not contractually engaged to direct the surgical unit and to obtain a staff to provide surgical service. The other employees of Hartford Dialysis, including the bookkeeper, clerical staff and assistant and head nurse, also worked in the facility owned by Hartford Hospital and managed and directed by Hartford Dialysis.

Limited analysis of part B is found either in Connecticut or other jurisdictions utilizing the ABC test. In F.A.S v. Reilly, supra, the

Administrator had conceded that the critiquing and grading performed by the artists and writers in their own studios satisfied the second prong of the test. Other jurisdictions construing identical statutes have recognized that work may not be "outside the usual course of business" or "outside of all the places of business of the enterprise for which the service is performed" even where the employer does not own or lease the place of business. A nurse anesthesist who performed her duties at a local hospital under a contract with a surgeon was held, under the Kansas Unemployment Compensation Act, to be an employee of the surgeon. The surgeon scheduled the claimant's hours and provided the claimant with the necessary equipment. The nurse did not have a significant investment in the work. Services were rendered personally by the nurse and were an integral part of the surgeon's business. The relationship was one of continuing employment and the nurse did not provide similar services to other surgeons or the public. K.U.T. Ruling 87-38-1(b), Kansas Unempl. Ins. Rep. (CCH) ¶ 8225.07 (8/25/88). The Kansas Unemployment Tribunal found a claimant who performed construction work in a flour mill under a contract with a construction company to be an employee of the construction company and not the mill. K.U.T Ruling No. 85-9-1(b) Kansas Unempl. Ins. Rep. (CCH) ¶ 1332.17 (12/17/85). In the case before us, the hemodialysis is not performed outside the places of business of the enterprise for which the service is performed any more than a construction site is outside the place of business of a contractor or a secured building is outside the place of business of an agency contracting to provide security personnel. In all these cases, the terms of the contract to provide service to the facility establish that, while not owned or leased, the facility is nonetheless a place of business. Having failed to satisfy part B of the ABC test, the subject employer has failed to establish that the claimant is exempted from the status of an employee.

The subject employer similarly fails to show that the claimant is not an employee because "such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." Conn. Gen. Stat. § 31-229(a)(1)(B)(ii)(III). The C prong of the test has been construed by the Connecticut Supreme Court in F.A.S. International, Inc., v. Reilly, 179 Conn. 507, (1980). In F.A.S., the court held that artists, writers and photographers who were hired as instructors to grade and critique student work were practicing elements of their chosen profession. The court noted that the professional artists were hired for their practical experience and were otherwise engaged in an independent business of the same nature as that engaged in by their service to F.A.S. The appellant maintains that each dialysis nurse is also a registered nurse and a member of a well established profession. However, even if we were to accept the appellant's contention that the independently established profession of nursing is "of the same nature" as the highly specialized nursing activities in the dialysis unit, the nurses would fail to satisfy the C test for a more fundamental reason.

Section 31-222(a)(1)(B)ii)(III) requires a showing that the individual "is customarily engaged" in such independent profession. "Customarily" is defined as "in a customary manner." Customary is "agreeing with custom: established by custom: commonly practiced, used or observed." WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY 559 (17th ed. 1976). "Is" is the third person, singular, present tense indicative form of the verb "to be". Id at 1197. To find that the dialysis nurses "are customarily engaged in an independently established profession," there must be "one or more enterprises created by them which exist separate and apart from their relationship with [the contractor] and which will survive the termination of that relationship." F.A.S. International v. Reilly, 179 Conn. 507, 515 (1980). The Connecticut Supreme Court distinguished the situation of the artists, who along with their other work had been engaged to critique students' art work, from that of a case, Rozran v. Durkin, 381 Ill. 97, 105, 45 N.E. 2d 180 (1942), in which a person was engaged to deliver packages for the plaintiff and had no time to and did not perform services for others. Unlike the professionals in F.A.S. International, the sole employment of the individual in Rozran consisted of the performance of services for the plaintiff. To satisfy part C of the test, the individuals must perform services independent of the connection with the principal, and the continued performance of those services must not be subject to their relationship with the principal. F.A.S. International v. Reilly, supra at 515. The statute does not require that an individual merely be able to engage in activity independent of that with the contractor. Rather, it requires that the individual be customarily engaged in the independent activity at the time of rendering the service. See 76 Am Jur 2d Unemployment Compensation, Section 39.

In the case before us, the dialysis nurses may be free to perform their services for other entities than Hartford Dialysis, but the individuals do not customarily do so. The nurses are not customarily engaged in an independently established business or profession of the same nature. Most were trained by Hartford Dialysis to perform hemodialysis and have worked almost exclusively for Hartford Dialysis since they were trained. The one instance of independently engaging in the profession that could be identified by the appellant was when one of the claimants, Joan Benedict, performed dialysis services at a children's summer camp for a two-week period during her vacation from Hartford Dialysis. Although there was a suggestion that other nurses might have worked for facilities other than Hartford Hospital, no details are contained in the record. Part C of the statutory exception envisions an individual with a number of contracts or business ventures that are independent of the relationship with the contractor, and not the stable, long term, and exclusive relationship the dialysis nurses have with Hartford Dialysis. It is irrelevant whether this circumstance results from the nurses' preference or because the occasional twenty-four hour, on-call duty which is required of each individual rendered it impracticable to obtain work other than with Hartford Dialysis. The appellant has failed to satisfy part C of the ABC test.

The remaining prong of the ABC test requires that an individual be free from control and direction, both under the contract and in fact, in connection with the performance of such service. Part A of the test has been interpreted by the Connecticut Supreme Court to be essentially the same as the common law test for independent contractors. This test depends on

whether there is a right to control the means and method of work. F.A.S. International, Inc. v. Reilly, supra, citing Beaverdale Memorial Park, Inc. v. Danaher, 127 Conn. 175, 179, 15 A.2d 17 (1940). An independent contractor is "one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work." F.A.S. International v. Reilly, supra, citing Darling v. Burrone Bros., Inc., 162 Conn. 187, 195, 292 A.2d 912 (1972). Conversely, the employee "contracts to produce a given result subject to the lawful orders and control of his employer in the manner and methods used in that employment. He is bound in some degree to the duty of service to the employer. Moreover, '[t]he manner of remuneration, whether in wages, salary, commission, by piece or by job, is not decisive or controlling in determining whether one is an employee or an independent contractor exercising control over the manner of his own work.'" Pratt v. Administrator, Docket No. 77-16-92-05, Superior Court, Judicial District of New Haven, Oct. 27, 1980 (citations omitted). It is the appellant's contention that the dialysis nurses are independent contractors because they are paid a fee for the performance of their service, do not receive any benefits such as holiday, vacation or sick pay, and have control of their own working schedules and arrangements. The scheduling is accomplished through an organization known as the Hemodialysis Council, which consists of a group of four nurse representatives as well as a larger group of all the nurses and which establishes by majority vote policies and proposals relating to scheduling and coverage by the nursing staff.

Although the dialysis nurses have considerable autonomy in their schedules, the Board finds that Hartford Dialysis has general control and direction over the means and methods employed in providing the dialysis service. The Hemodialysis Council is a mechanism that permits the nurses as a group to adopt policies relating to scheduling the approximately thirty nurses to cover the necessary shifts and distribute the work in order to provide the required service. Despite the considerable control by the nurses over this condition of their employment, a number of factors persuade us that Hartford Dialysis, which has contracted to provide medical administration, supervision, and management of all dialysis procedures, ultimately controls the nurses' performance of the service.

Although Dr. Izard is not generally present during the performance of the dialysis procedures, when the procedure was initially developed it was performed by a physician with nurse assistance. As chronic dialysis developed and the procedure became more routine, standing orders were implemented by Hartford Dialysis. These orders reflect state and federal regulations (for example, the isolation protocol) as well as the policy and procedures relating to details of performance established by Hartford Dialysis. Hartford Dialysis, in undertaking the administration, supervision and management of all dialysis procedures, controls the method of providing the dialysis service. Regardless of whether the directives evolved from Hartford Dialysis in order to affect medically appropriate service or were imposed by Hartford Hospital or governmental agencies, Hartford Dialysis controls the dialysis nurses insofar as it is responsible for supervising the dialysis service and assuring that the requirements are satisfied.

The appellant's contention that the Hemodialysis Council makes all decisions regarding staffing and scheduling is not supported by the record. The four member group which is responsible for setting the agenda and for offering proposals to the larger group consist of three representative dialysis nurses and the head nurse or assistant head nurse. The head nurse is a member of the administrative staff of Hartford Dialysis and is a non-voting member of the council. As such, she represents Hartford Dialysis's position to the council and has imput into the personnel procedures developed. The influence of the head nurse is limited, as is evidenced by the thwarted attempt of head nurse Karpovitch to have three nurses on call, but it nonetheless exists. Moreover, staffing decisions have been implemented by Hartford Dialysis over the objection of the full council. For example, an individual retained by Hartford Dialysis to provide dialysis services was exempted from some of the terms the other nurses had imposed on each other.

Evidence of actual control by Hartford Dialysis rather than the council is found in the council's inactivity for several years. During this time the head nurse arranged the nurses' schedules. It was only at Dr. Izard's suggestion in August, 1986, that the council became reactivated. The dialysis nurses are responsible for providing twenty-four hour, on-call emergency dialysis service to Hartford Hospital. It is not necessary for Hartford Dialysis to control the details of the coverage since it is to the nurses' benefit that they divide the responsibilites fairly among themselves. As long as a member of this trained team provides the service, it makes little difference to Hartford Hospital or Hartford Dialysis which member is available. However, general control of "what shall be done and when and how it will be done -- the right of general control of the work" exists. Welz v. Manzillo, 113 Conn. 654, 680, 155 At. 841 (1931).

Control over the basic direction of the nurses is found in Hartford Dialysis's right to discipline and discharge individuals for reasons other than a breach of contract. The retention of the right to discharge has been held to be a strong indicator that the relationship is one of employment, since the independent contractor must be permitted to finish his contract in the absence of breach on his part.[2] Jack and Jill, Inc., v. Tone, 126 Conn. 115 (1939). In the instant case, the head nurse was authorized to reprimand nursing personnel for failing to have blood work drawn for hepatitis testing. See Procedures for Evaluating Nursing Personnel for Hepatitis, August, 1985. Nurses may be disciplined for insubordination, the use of obscenity, or failing to acquire the reguisite continuing education. The claimant in the instant case was terminated for her refusal to service patients testing positive for the AIDS virus.[3] See Hartford Dialysis Disciplinary Procedure. Other factors, while not dispositive, support a finding that Hartford Dialysis controls the means and methods of providing the dialysis service. Hartford Dialysis has the final approval of how many and which dialysis nurses it will utilize to provide the service. Also, Dialysis nurses are unable to subcontract their work to other trained nurses who are not part of the Hartford Dialysis team.

Other evidence of control may be found in the requirement that dialysis nurses do maintenance duties in the unit as well as conduct the dialysis

procedure. Nurses order and put away stock and are responsible for checking the emergency cart. Nursing notes direct the nurses how to handle charge card items and which size needles to use for the procedure. On-the-job training in the specialized dialysis services has been provided by Hartford Dialysis and implemented through the trained dialysis nurses.[4] Standing orders limit any discretion in the performance of the job duties.

A job description of the dialysis staff nurse provides that the nurse "participate in the assessment of nursing needs and planning and carrying out patient care...serve as a resource person to the health team as regards the nursing process," and serve as a member of a two- or three-person team assigned to acute coverage on an on-call basis. The nurses are further required to provide staffing assistance during staff illness, vacations, and holidays and are subject to peer review and annual performance evaluations. The dialysis nurses' responsibilites are broader than the mere application of the dialysis procedure and support a finding that the nurses are an integral part of the health care team rather than independent contractors hired to do dialysis procedures only. Therefore, we conclude that the appellant has also failed to satisfy part A of the ABC test.

On the basis of the foregoing, the Board concludes that Hartford Dialysis has failed to establish that the service performed by the dialysis nurses comes within the statutory exception to employment subject to the Unemployment Compensation Act. The decision of the Referee is affirmed and the appellant's appeal is dismissed. In so ruling, the Board adopts the Referee's findings of fact, with the exception of findings 5 and 8, as modified by the foregoing.

BOARD OF REVIEW

_____

Bennett Pudlin, Chairman

In this decision Board member Patrick Quinn concurs.

BP/oc

FOOTNOTES

1. As the appellant has noted, the relationship between Hartford Dialysis and Hartford Hospital is complex. The question of whether Hartford Hospital, as opposed to Hartford Dialysis, is the employer is not properly before us. We do note that, pursuant to Conn. Gen. Stat. § 31-223(a)(9)(B), an employer who contracts or subcontracts for any work which is part of the employer's usual trade or business and which is performed on the premises under the employer's control, will be deemed to employ each individual in the employ of the contractor or subcontractor for each day during which the individual is engaged solely in performing such work, where the contractor or subcontractor is not an employer for all purposes of the Unemployment Compensation Act,

2. The Board finds it unnecessary to rely on the September 22, 1987, memorandum which was signed by Dr. Izard, head nurse Karpovich and assistant head nurse King. The appellants contend that the memorandum is inaccurate. The memorandum states that administration is and must be responsible for certain decisions, such as the number of dialysis nurses hired and acute coverage, and that the council's imput was desired in order to determine the most satisfactory method of implementing adequate coverage. See Letter from Nancy T. Karpovich, R.N., Judy King R.N. and Mark Izard, M.D., to nurses (9/22/87).

3 Hartford Dialysis contends that the Hemodialysis Council, and not Hartford Dialysis, voted to remove the claimants from the group. However, under the independent contractor analysis urged by the appellant, since Hartford Dialysis contracted with the individual nurses, it alone would have had the authority to suspend their working privileges. It is worth noting that the I.R.S. conclusion that the dialysis nurses were independent contractors relied in part on a representation that Hartford Dialysis does not require nurses to accept any particular patient for treatment. Inter. Rev. Technical Advice Memorandum (11/23/76).

4. There is disagreement between the parties as to whether Hartford Dialysis is still training nurses. A training period is required according to the job description of a dialysis staff nurse. There has been a pool of trained dialysis nurses available in recent years and there is not a significant turnover among the dialysis nurses, so not much training has recently been required. However, effective September 28, 1988, the regulations of the Department of Health Services provide that a training program will be provided to the nursing staff by "the dialysis unit of employment prior to the employee functioning in the position...." See Conn. Agencies Regs. § 19-13-D55(L)(1).

BR-1 # 6

STATE OF CONNECTICUT
Department of Labor
Employment Security Appeals Division
Board of Review
38 Wolcott Hill Road
Wethersfield, CT 06109
Telephone: (860) 566-3045 Fax: (860) 566-6932

IMPORTANTE - TENGA ESTO TRADUCIDO
INMEDIATAMENTE - TIEMPO LIMITADO PARA APELAR

Claimant's Name, Address & S.S. No.
ADMINISTRATOR

Board Case No.: 9008-BR-00
Referee Case No.: 9004-AA-99

S.S. #: 000-00-0000

Employer's Name, Address & Reg. No.
JSF PROMOTIONS, INC.
7A Farmington Chase Cres.
Farmington, CT 06032

E.R. #: 91-846-15

Date mailed to interested parties: July 10, 2001

DECISION OF THE BOARD OF REVIEW

CASE HISTORY AND JURISDICTION

The Administrator ruled that the demonstrators listed in the Administrator's field audit report were employees for purposes of the Unemployment Compensation Act by a decision issued on April 29, 1999. On May 20, 1999, the employer appealed the Administrator's decision to the Hartford office of the Appeals Division. The Appeals Division scheduled a hearing of the appeal for May 26, 2000, which both the Administrator and the employer attended. By a decision issued on October 6, 2000, Associate Appeals Referee Sherwin M. Nelson affirmed the Administrator's ruling.

The employer filed a timely appeal to the Board on October 27, 2000. Acting under authority contained in Section 31-249 of the Connecticut General Statutes, the Board of Review has reviewed the record in this appeal, including the tape recording of the Referee's hearing.

ISSUE

The Referee affirmed the Administrator's April 29, 1999 ruling that the individuals listed as performing services as product demonstrators were employees of the appellant. In support of this appeal from the Referee's decision, the appellant contends that the Referee's facts are not supported by the record and that his decision is erroneous. The issue before the Board is whether the service performed by the product demonstrators who performed demonstrations for the appellant between 1996 and 1998 is covered employment under the Connecticut Unemployment Compensation Act.

PROVISION OF LAW

The Connecticut Unemployment Compensation Act defines employment in Conn. Gen. Stat. § 31-222(a)(1)(A) and (B). The "ABC" test contained in Conn. Gen. Stat. §31-222(a)(1)(B)(ii), utilized to ascertain whether an employer-employee relationship exists under the Act, provides that any service provided by an individual is considered employment unless and until the recipient of the service sustains the burden of proving that:

> (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed....

The test is in the conjunctive, and the appellant must satisfy all three prongs before service will be excluded from employment covered by the Act. Latimer v. Administrator, 216 Conn. 237, 247, 579 A. 2d 497 (1990).

DECISION ON REQUEST FOR EVIDENTIARY HEARING

The appellant requests a hearing before the Board on the grounds that it wishes to present evidence, testimony, and argument concerning the Referee's alleged omission of facts and incorrect conclusion of law. The appellant contends that because the Referee failed to make certain factual findings, his findings and his reasoning based on those findings are flawed and defective.

The Referee must make findings of fact on all material issues. *See* Boudreau v. Koenig Art Shop, Inc., Board Case No. 1620-83-BR (9/20/83). The Referee's findings of fact shall contain all findings of fact necessary to the resolution of each issue involved. Conn. Agencies Regs. § 31-237g-33 (b)(4). The conclusions of law must be supported by the findings of fact. *See* Zieff v. Administrator, Board Case No. 1827-83-BR (11/4/83).

The appellant has set forth a number of factual findings which it maintains the Referee erred in not including in his findings of fact and a number of factors which it alleges the Referee failed to consider in rendering his decision. The appellant does not request an opportunity to add additional testimony or evidence to the record. Therefore, the Board, in its *de novo* review of the record, may consider whether there is evidence in the record to support the factual findings requested by the

appellant and whether they are material to the issues raised by this case. In regard to the factors the appellant raises, for example, that the Referee failed to consider that demonstrators enter into independent contractor agreements with the appellant, the Referee did make a factual finding that the demonstrators were required to sign independent contractor agreements. Thus, the Referee presumably considered this fact in reaching his conclusions.

Since the Board, in conducting its *de novo* review, will determine both the factual and legal issues raised in the appellant's request, we **deny**, the appellant's request for a hearing before the Board pursuant to Conn. Agencies Regs. §31-237g-40.

FINDINGS OF FACT

The following facts are found by the Board:

The appellant provides product demonstrators to area stores at the request of the product manufacturers to promote the manufacturers' products. The appellant has an office in Farmington where it employs a number of office workers. The appellant does not demonstrate products, but arranges for demonstrators to perform demonstrations at the request of manufacturers. The product demonstrators sign one-year independent contractor agreements which provide that the relationship is that of an independent contractor. The contract does not restrict the product demonstrator from performing the same or similar work for another entity, although there are no longer similar businesses located in the state of Connecticut, or from performing other work.

The appellant does not provide any training to product demonstrators. Either the store where the product is sold or the product manufacturer contacts the appellant and requests the services of product demonstrators. Generally, the product manufacturers determine when and where they would like a product demonstration, often to introduce new or improved products to a market. The product manufacturers contact the appellant and provide the appellant with a specification sheet and a demonstration kit. The appellant then contacts an individual product demonstrator and offers the assignment. If the demonstrator accepts the assignment, the appellant gives the demonstrator the manufacturer's "spec" sheet and kit with instructions and a script. Sometimes manufacturers provide promotional materials, such as aprons or table covers, promoting the product or manufacturer.

A product demonstrator may be offered work or may obtain jobs by contacting a demonstration agency to advise the agency he or she is available for work. The product demonstrator may refuse an assignment without any consequence. If a demonstrator has indicated his or her availability at a certain day and time, the appellant may mail the manufacturer's material directly to the demonstrator. The demonstrator may accept the assignment, or refuse it and mail the material back. If a product demonstrator accepts an assignment and later determines that he or she cannot do the demonstration, the product demonstrator can find a replacement or notify the appellant and the appellant will find a replacement. In the southern part of the state, where the appellant has had difficulty finding demonstrators, the appellant sends a packet of proposed demonstrations to an individual who locates the demonstrators. The appellant is unaware of who will conduct the demonstration until the demonstrator submits an invoice for payment. The demonstrator is expected to notify the appellant if he or she rescheduled a demonstration or if any part of the kit is missing.

Product information is provided by the product manufacturer to the product demonstrator. The product demonstrator is expected to provide small appliances and kitchen equipment, such as a microwave, hot plate, toaster oven, card table, trash bags, cutting board, knives, crock pot, electric frying pan, and extension cord, needed for a particular demonstration. The appellant pays the store for the demonstrator's right to hold a demonstration. The demonstrator contacts the store manager and arranges the time and place for the demonstration. The demonstrator is expected to comply with

the store manager's rules. He or she may adjust the timing of a demonstration with the store manager from that requested by the manufacturer based on his or her knowledge of the population being served and the product being promoted. For example, a demonstrator might choose to offer samples of a breakfast food earlier in the day than recommended by the manufacturer. During the demonstration, the demonstrator distributes samples and coupons provided by the manufacturer with the goal of inducing sales of the manufacturer's product. The demonstrator may have an allowance from the manufacturer to purchase the product from the store or may be provided with the product. The demonstrator submits an invoice to the appellant, by which the product demonstrator is reimbursed for product and paper goods used in the demonstration.

The demonstrator does not offer his or her services as a product demonstrator to the public, carry business cards or advertise his or her own business. The demonstrator is not registered with the state as an independent business. He or she is not required to be licensed by the state. Some of the demonstrators had full-time employment elsewhere or were self-employed in other fields, such as carpentry. Some of the demonstrators have performed demonstrations for other promotional companies formerly located in the state or with business offices in other states.

Barbara Bishop accepted assignments from two Massachusetts-based promoters as well as the appellant. At the time of the hearing, she was accepting most of her assignments from one of the other promoters. She also had an unrelated doll and toy business, which required a resale license. Trudy Pietruska also demonstrated for one and occasionally another Massachusetts promoter, and has through the years worked for five promoters. Denise Harper has been booked to perform demonstrations by six different promoters, three from New Jersey, one from Massachusetts, one from Minnesota, and one from California. Harper also conducts surveys and works as a mystery shopper. Rosemary Anquillare accepted demonstration jobs exclusively from the appellant, although she has previously accepted a few jobs from a New Jersey company, and also works as a professional musician. Louis Anquillare is retired from a full-time job and works strictly for the appellant. Jane Shea has full-time employment in merchandising and does demonstrations for up to three companies, including the appellant. Anquillares, Shea or Harper are not listed or named as providing services to the appellant during the quarters under review.

The product demonstrator is paid by the job at a rate set by the appellant based on the contract with the manufacturer and the cost of obtaining the demonstration space. On a rare occasion, a demonstrator has negotiated a higher price than initially offered by the appellant because of the nature of a job. The appellant pays the demonstrator from an invoice which the demonstrator must have signed by the store manager and must turn in the day after the demonstration. The appellant does not check on the demonstrator's work. However, the manufacturer may employ a mystery shopper to check on the performance of a demonstrator. The demonstrator lists in the invoice the cost of products and supplies used in the promotion. The appellant pays for the products and supplies and is itself reimbursed by the manufacturer.

The appellant does not provide sick or vacation time, or health or retirement benefits. The appellant maintains a Demonstrator Liability and Indemnity Agreement to hold the store harmless for a demonstrator's activity, and it carries workers' compensation insurance. The appellant pays some stores a performance bond. The appellant does not deduct federal income tax or social security taxes and supplies the product demonstrator with a Form 1099 for federal tax filing. The product demonstrator generally files Schedule "C" tax forms as a self-employed individual, pays his or her own social security contributions and deducts his or her expenses for travel and equipment.

DISCUSSION

The Referee concluded that the employer failed to satisfy the first and third prong of the ABC test. The Referee found that the named product demonstrators were not free from control and direction in the performance of their services since they did not negotiate with the client or the store and the appellant told them where to report and what services to perform, and set the fees for their services. The Referee further held that the appellant failed to prove that the individuals providing the service were customarily engaged in an independently established trade, occupation of business of the same nature as that involved in the service performed for the appellant.

We note that the "ABC" test set forth in Conn. Gen. Stat. § 31-222 is not unique to Connecticut, and that a majority of the jurisdictions administering an employment security program certified by the federal government have adopted the "ABC" test or some variation of the "ABC" test for determining whether service should be considered covered employment. The Board and the Connecticut courts have looked to other jurisdictions for guidance in interpreting the "ABC" test, although they are not bound by decisions from other jurisdictions. *See* Daw's Critical Care Registry, Inc. v. Dep't of Labor, 42 Conn. Supp. 376, 622 A.2d 622 (1993), aff'd 225 Conn. 9, 622 A.2d 518 (1993); Tracy v. The Norwich Bulletin, Board Case No. 9030-BR-93 (12/12/95).

Part A of the "ABC" test contained in Conn. Gen. Stat. § 31-222(a)(1)(B)(ii) requires that the employee has been and will continue to be free from any control or direction in connection with the performance of such service, both under the contract for performance of such service and in fact. Essentially the common law test for independent contractors, Part A requires an analysis of whether there is a right to control the means and method of performing the work. F.A.S. International, Inc. v. Reilly, 179 Conn. 507, 427 A.2d 392 (1980), citing Beaverdale Memorial Park, Inc. v. Danaher, 127 Conn. 175, 179, 15 A.2d (1940). An independent contractor contracts to do a piece of work according to his own methods, without being subject to the control of the employer except as to the results of the work. Darling v. Burrone Bros., Inc., 162 Conn. 187, 292 A.2d 912 (1972); F.A.S. International, Inc. v. Reilly, supra. An employee, on the other hand, contracts to produce a given result subject to the lawful orders and control of the employer in the manner and methods employed. Pratt v. Administrator, Docket No. 77-16-92-05, Superior Court, Judicial District of New Haven, 10/27/80.

The Utah Court of Appeals, in applying a twenty-factor analysis which is essentially the "A" or control test, determined that product demonstrators were independent contractors in Tasters Ltd., Inc. v. Department of Employment Security, 863 P.2d 12 (Utah Ct. App. 1993). The factors on which this court focused were the ownership of equipment, lack of direction and supervision by the business, payment in full upon completion of the job, lack of training, ability to assign replacements, and ability to accept or reject the work offered. Similarly, applying an "AB" test, the Kansas Court of Appeals found product demonstrators were independent contractors since there was no fundamental right to control their work. Crawford v. State of Kansas Department of Resources, 17 Kan. App.2d 707 , 845 P.2d 703 (Kan. Ct. App. 1989). To the contrary, in Jerome v. ESD, 69 Wa. App. 810, (WA Ct. App. 1993), the Washington Court of Appeals affirmed an agency ruling that food product demonstrators were not independent contractors but rather employees. In that case, the appellant hired the demonstrators, trained them, instructed them how to cook, told them when to arrive for the demonstrations and what to wear, occasionally observed the demonstrations, and reviewed all reports. Therefore, the court found that the appellant had retained the right and ability to direct and control the details of the demonstrators' performance.

A number of facts tend to support a finding that the demonstrators in the case before us are free from control and direction by the appellant in performing their demonstrations. Demonstrators are not required to accept assignments and may subcontract a job. Demonstrators must supply their own

transportation, tools and equipment. The product manufacturers supply the "spec" sheet and demonstration kit and determine when and where they would like a product demonstration. The appellant makes the initial contact with the store where the demonstrator is to work, but the demonstrator may make alternate arrangements with the store manager as to when and how a demonstration will be conducted without consulting the appellant. The appellant does not train or supervise the demonstrators in the performance of their demonstrations. After a promotion is held, demonstrators provide the appellant with a proof of performance invoice, in which the store manager documents the length of the demonstration and the demonstrators list their expenses for products and supplies. Demonstrators have occasionally negotiated a higher price than initially offered by the appellant because of the nature of a job. If a demonstrator is unable to make a demonstration, he or she may arrange for another person to do the demonstration without advising the appellant. Product demonstrators generally file schedule "C" tax forms as self-employed individuals, pay their own social security contributions and deduct their expenses for travel and equipment. By the terms of the contract, product demonstrators are not provided with health or retirement benefits, and are not subjected to social security or federal income tax withholding.

On the other hand, product demonstrators could contact the appellant if they are unable to make an assignment and the appellant would obtain a replacement. The appellant sets the rate of pay by the job and maintains workers' compensation and liability insurance. The demonstrators are often reimbursed by the appellant for the cost of products and supplies. The appellant is in turn reimbursed by the manufacturer.

In weighing the factors which are significant to the Part A of the "ABC" test, we find that both by the terms of the contract and in fact the product demonstrators are free from the appellant's control and direction in the performance of their services. If anyone has the right to control the product demonstrators, it appears to be the manufacturer or the store manager rather than the appellant.

Part B of the "ABC" test requires that the service of an independent contractor be performed outside the usual course of business for which the service is performed or outside of all places of business of the enterprise for which the service is performed. This provision is in the alternative, and the employer need only establish that the service is either outside the course or outside the place of its business. The place of business is not only the office, but the individual job sites at which the employer contracts to provide service. *See* Greatorex v. Stone Hill Remodeling, Board Case No. 1169-BR-88 (1/9/88), *aff'd sub nom.* Stone Hill Remodeling v. Administrator, Superior Court, Judicial District of Waterbury, 2/21/91; Feschler v. Hartford Dialysis, Board Case No. 995-BR-88, (12/27/88).

We have previously ruled that a construction site or a client's premises may become an employer's place of business if the employer is physically present on the site or has the right to supervise the work performed at the site. *See* Scatena v. Diverse Contracting, Board Case No. 9015-BR-93 (11/9/95); Brown v. The Cleaning Crew Co., Board Case No. 166-BR-89 (3/23/89). In this case, the appellant itself does not perform demonstrations, but it acts as an agent or broker between manufacturers, stores and demonstrators. The appellant is not present in the store when demonstrations occur and has not retained the right to supervise the work performed. The appellant has, therefore, satisfied Part B of the "ABC" test.

Part C of the "ABC" test requires a showing that the individual is "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." Conn. Gen. Stat. § 31-222(a)(1)(B)(ii)(III). Part C requires a showing that the individuals have "one or more enterprises created by them which exist separate or apart from their relationship with [the contractor] and which will survive the termination of that relationship." F.A.S. International v. Reilly, *supra,* at 515. The Board has held that the statute does not require that an individual merely be able to engage in activity independent of that of the employer, but that the individual must be customarily engaged and holding himself out to the public as one who is engaged in the independent activity at the time of rendering the service. Feschler v. Hartford Dialysis, Board Case No. 995-BR-88 (12/27/88). This interpretation has been upheld by the Connecticut Supreme Court:

> The court notes that the adverb 'independently' modifies the word 'established' and in that context, fairly construed, means that the trade, occupation, profession or business was established independently of the 'employer' (Daw's). Moreover, such 'independently established activity' must be one in which the 'employee' is 'customarily engaged.' 'Customarily' has been said to mean 'usually, habitually, regularly.' The use of 'is,' the present tense, shows that the 'employee' must be engaged in such independently established activity at the time of rendering the service which is the subject of inquiry. An established business has been said to be one that is permanent, fixed, stable, or lasting.

Daw's Critical Care Registry v. Department of Labor, 41 Conn. Sup. 376, 407, 622 A. 2d 622, *aff'd* 225 Conn. 99, 622 A. 2d 518 (1993).

In interpreting Part C of the "ABC" test, the Washington Court of Appeals in Jerome, *supra,* held that the most important factor in determining whether an individual is independently engaged is the ability to continue in business if the worker loses a particular customer. The Utah Supreme Court in New Sleep, Inc. v. DES, 703 P.2d 289 (Utah 1985), held that to find an independently established business, the business must exist independent of the service being considered in the sense that the business is the whole of which the particular service is a part. The court held that water bed installers, many of whom had unrelated full-time or part-time work or were engaged as full-time students, but who also installed water beds for a competitor and individual customers, did not engage in an independently established business.

The New Jersey Supreme Court in Carpet Remnant Warehouse v. DOL, 125 N.J. 567, 543 A.2d 1177 (1991), noted that to sustain a ruling that an individual is an independent contractor, it is not enough to show that certain carpet installers are not financially dependent on one retailer. The court noted that in determining whether Part C has been satisfied, the adjudicator must take into account various factors relating to the worker's ability to maintain an independent business, such as the duration and strength of the business, the number of customers and their respective volume of business, the number of employees, and the extent of the installer's tools, equipment, vehicles, and similar resources. The court also considered the comparative amount of remuneration the installer received from the appellant compared to that received from other retailers. The court noted that an installer who received a small portion of compensation from the appellant was more likely to withstand losing the appellant's business. The court held that the two named individuals were independent contractors and remanded the matter to the New Jersey Commissioner of Labor to

consider whether the other installers had satisfied Part C. From this case as well as the language of the Connecticut statute, it is clear that Part C of the "ABC" test is determined on an individual basis.[1]

In Barb's 3-D Demo Service v. Director, No. E98-247, _ S.W.3d _ (Ark. Ct. Ap. March 22, 2000), the Arkansas Court of Appeals found that food demonstrators were not customarily engaged in an independently established trade, occupation, profession or business even though the demonstrators worked for other agencies. The court held that the even though some of the demonstrators worked for other agencies, the demonstrators' working relationships with the other agencies was other part-time employment because the food demonstrators were incapable of operating independent of the relationships with the agencies and the demonstrators did not have direct relationships with the vendors.

There are other jurisdictions which have determined that product demonstrators are independent contractors. The Utah Court of Appeals held that under the statutory twenty-factor test, product demonstrators were independent contractors. Tasters, Ltd., Inc. v Department of Employment Security, 863 P.2d 12 (Utah Ct. App. 1993). The Kansas Court of Appeals determined that there was no employer/employee relationship in Crawford v. State of Kansas Department of Resources, 17 Kan. App. 2d 707, 845 P.2d 703 (Kan. Ct. App.1989). Neither Kansas nor Utah applied the "ABC" test, and, although some of the factors considered by those states are related to the Part C analysis, the standard in these jurisdictions does not require that the individual be customarily engaged in an independently established trade or business. The standard applied by the Washington Superior Court in Pioneer Food Sales v. Commissioner of the Employment Security Department, State of Washington, No. 86-2-21377-7 (Wash. Superior Court, Nov. 2, 1987) is distinguishable on its facts and on the legal standard applied. The Washington Superior Court noted that food demonstrators contacted other food suppliers, food brokerage houses, and grocery stores and were under the influence and control of other employers. The court stated that the demonstrator's employment did not depend upon Pioneer, that Pioneer was just a conduit, and that the demonstrators could continue to provide their services to other employers and principals. The court's Part C analysis did not clarify that the demonstrators' relationships with the other employers was not other part-time work. Finally, the New York Unemployment Insurance Appeal Board, considering the relationship of the appellant with its product demonstrators, did not apply the "ABC" test when it concluded that the product demonstrators were not employees in In the Matter of JSF Promotions, Board Case No. 095-36820 (1/16/96).[2]

In the product demonstration field, there are many manufacturers that only occasionally promote new or improved products over widespread regions. The appellant serves as an intermediary between those desiring demonstrations and those willing to perform them. Because of the nature of the industry, the demonstrator as well as the manufacturer is benefited by using the appellant and other

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[1]The legislature has elected to designate certain occupations as outside the scope of the "ABC" test, e.g. travel agents who work on commission are statutorily declared to be dependent contractors. The legislature has not created an exception from Conn. Gen. Stat. § 31-222(a)(1)(B)(ii) for product demonstrators.

[2]The above cases, relied on by the appellant in its appeal, are attached to the appellant's December 8, 2000 memorandum.

demonstration companies as screening agencies. There is no evidence that the demonstrators offered their services as product demonstrators to the public, advertised, or carried business cards. Product demonstrators obtain jobs by contacting the various agencies, advising them of their availability, and requesting work. The demonstrators maintain that they do not need business cards because there are only a few agencies, some work exclusively for the appellant, and for others, word of mouth contact is sufficient.

Demonstrators have a small capital investment in equipment, pay their own travel expenses, but have little if any risk of loss depending on the time it takes to travel and conduct a product demonstration and distribute samples and coupons. The demonstrators consider themselves to be independent contractors, filing schedule "C" federal income tax forms as self-employed individuals. Demonstrators pay their own social security contributions, and deduct their expenses for travel and equipment.

The people who work as product demonstrators are a diverse group. Some worked as product demonstrators only once or twice, while others have demonstrated products for the appellant for years. Some exclusively work as demonstrators; other have unrelated full-time work. We recognize that it is a difficult burden to produce evidence to satisfy Part C of the "ABC" test, considering how many demonstrators work for the appellant. Nonetheless, the legislature has provided a statute that necessitates this inquiry. Some of this information could be obtained through questions posed to the demonstrators at the time they enter into a contract with the appellant.[3]

Based on the evidence in the record provided by the appellant's witnesses regarding their work for other agencies, three of the demonstrators have established that they have a business capable of operating independently of their relationship with the appellant. Bishop had another unrelated business which does not satisfy the C part inquiry. However, she also accepted food demonstration assignments, primarily from one other promoter, and thus was able to continue in business even if she lost the appellant as her promoter. Pietruska also demonstrated primarily for one other promoter but has worked for up to four or five different promoters. Essentially, either could work as a demonstrator other than through her relationship with the appellant. Harper also appears to have an established demonstration business, working for seven different promoters. However, neither Harper, Shea, nor the Anquillares are named as individuals providing service for the appellant, and

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[3]There is a question as to whether employer liability for unnamed individuals automatically flows from a determination that a particular individual is an employee. *See* Arrow Building Maintenance v. Administrator, Docket No. 285993, Superior Court, Judicial District of Hartford-New Britain at Hartford, 5/15/85. Although there is no provision for a class action in the Unemployment Compensation Act, the Board can issue declaratory rulings or answer questions of law based on facts certified. We have made determinations of the status of a group of demonstrators whose names were listed in the record and who had identical contracts with the individual testifying before the Referee. *See* JSF Promotions v. Administrator, Board Case No. 9014-BR-97 (10/30/97), *appeal docketed,* Docket No. 05758015, Superior Court, Judicial District of Hartford. Furthermore, a determination of the status of certain named individuals may permit the Administrator to extrapolate to other, similarly situated individuals, particularly since there is a presumption in the statute that service performed is employment unless the appellant proves otherwise. In any event, in the case before us, we are dealing exclusively with named employees.

they apparently did not work for the appellant during the time at issue. We thus conclude that the employer has established that the product demonstrators Bishop and Pietruska are customarily engaged in an independent business as demonstrators. The employer has not established that any of the other named demonstrators are engaged in an independently established trade, occupation or business.[4]

CONCLUSION OF LAW

The Board of Review concludes that the appellant has failed to satisfy Part C of the "ABC" test set forth at Conn. Gen. Stat. §31-222(a)(1)(B)(ii) except for the demonstrators Bishop and Pietruska. We conclude that the other demonstrators providing their services to the appellant were engaged in employment within the meaning of the Connecticut Unemployment Compensation Act.

DISPOSITION AND ORDER

The decision of the Referee is **reversed in part** and the appellant's appeal is **sustained** with regard to the demonstrators Bishop and Pietruska. The Referee's decision is **affirmed** with regard to the other demonstrators.

BOARD OF REVIEW

Bennett Pudlin, Chairman

In this decision, Board members Robert F. Harlan and Alan M. Kyle concur.

BP:SSW:mal

IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY AUGUST 9, 2001. SEE LAST PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL RIGHTS.

[4]In JSF Promotions, Inc. v. Administrator, Docket No. CV-97 05758015, Superior Court Judicial District of Hartford, currently pending before the Superior Court, the Board determined the identical issue in an earlier time period. The Board concluded that the appellant failed to satisfy Part C of the "ABC" test in that case.

STATE OF CONNECTICUT
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Employment Security Appeals Division
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IMPORTANTE - TENGA ESTO TRADUCIDO INMEDIATAMENTE - TIEMPO LIMITADO PARA APELAR

Claimant's Name, Address & S.S. No.

GERRY BENITZ
64 Collins Street
New Britain, CT 06051

S.S. #: 582-51-5910

Employer's Name, Address & Reg. No.

D & K COMMUNICATIONS, INC.
c/o D. Case
55 Sims Road
Bristol, CT 06010

E.R. #: 41-157-53

Board Case No.: 9004-BR-10
Referee Case No.: 9000-AA-10

Date mailed to interested parties: *October 7, 2010*

DECISION OF THE BOARD OF REVIEW

I. CASE HISTORY AND JURISDICTION

By a decision issued on December 16, 2010, the administrator ruled the claimant was engaged in covered employer for the appellant. On December 23, 2009, the appellant appealed the administrator's decision to the Hartford office of the appeals division. The appeals division scheduled a hearing of the appeal for March 8, 2010, which the claimant, appellant and administrator attended. By a decision issued on March 17, 2010, Associate Appeals Referee Janice Dombrowski affirmed the administrator's ruling.

The employer filed a timely appeal to the board of review on April 6, 2010. Acting under authority contained in General Statutes § 31-249, we have reviewed the record in this appeal, including the recording of the referee's hearing.

II. DECISION ON THE APPELLANT'S REQUEST FOR A FURTHER EVIDENTIARY HEARING.

In support of this appeal from the referee's decision, the appellant seeks another hearing to reargue the issues raised in its appeal.

We will not retry a matter where the referee offered the party a full and fair opportunity to present its case. See *Lopez v. Southwick & Meister, Inc.* , Board Case No. 1211-BR-91 (11/26/90). The appellant has not indicated that it has any additional evidence it would produce, why it did not offer this evidence at the referee's March 8, 2010 hearing, or shown that it has evidence which is likely to change the outcome of the case. We find that the appellant has failed to establish good cause for an additional hearing before the board and we **deny** the appellant's request.

III. ISSUE

The referee ruled that the appellant employed the claimant and that its account is liable for benefits which the claimant received. In support of this appeal from the referee's decision, the appellant contends that the claimant and its other sales representatives are independent contractors. The appellant contends that the referee misinterpreted and misapplied Part C, since the claimant holds a trade license and has performed installation work for other entities. The appellant further contends that it has satisfied the B test because the claimant performed his services in its customer's homes, which is outside its place of business. Finally, the appellant maintains that referee was inconsistent in her decision as to whether the appellant satisfied Part C of the ABC test and that her determination on this prong should be reversed.

The issue before the board is whether the claimant was engaged in employment by the appellant within the meaning of the Connecticut Unemployment Compensation Act.

III. PROVISIONS OF LAW

The Connecticut Unemployment Compensation Act defines employment in General Statutes §§ 31-222(a)(1)(A) and 31-222(a)(1)(B). The ABC test contained in General Statutes § 31-222(a)(B)(ii), which is utilized to ascertain whether an employer-employee relationship exists under the Act, provides that any service provided by an individual is considered employment unless and until the recipient of the service sustains the burden of proving that:

> (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed....

Section 20-353(c) of the General Statutes, Restricted and Limited Licenses, provides that the Connecticut Department of Consumer Protection may issue a limited antenna dish installer license

to any person after completing an apprenticeship program established and approved by the apprenticeship training division of the Labor Department, and passing an examination approved or administered by the Department of Consumer Protection.

IV. FINDINGS OF FACT AND CONCLUSION OF LAW

Preliminarily, we do not find that the referee was inconsistent in stating that even if the appellant could satisfy Part A of the ABC test, it had not satisfied Parts B and C. In any event, even if the referee's decision was erroneous, the board conducts a *de novo* review of the record in issuing its decision.

The parties' characterization of the relationship by agreement is not determinative. "Language in a contract that characterizes an individual as an independent contractor [rather than an employee] is not controlling. The primary concern is what is done under the contract and not what it says.'" *Latimer v. Administrator*, 216 Conn. 237, 251 (1990)(citations omitted). We are required by the Connecticut Unemployment Compensation Act to look beyond an agreement or form to the substance of the relationship to ascertain whether there is an employer-employee relationship as defined by the Act. See *Taylor Graves v. Administrator*, 15 Conn. Sup. 399, 401 (1948); *Brown v. The Cleaning Crew*, Board Case No. 166-BR-89 (3/23/89).

There is a presumption under the Connecticut Unemployment Compensation Act that service is employment unless and until the appellant can establish that the service comes within a specific exemption to the Act or unless and until the appellant can establish, irrespective of whether the common law relationship of master and servant exists, that all prongs of the so called "ABC" test of General Statutes § 31-222(a)(1)(B)(ii) are satisfied. "Because the prongs of the ABC test contained in §§ 31-222(a)(1)(B)(ii)(I), 31-222(a)(1)(B)(ii)(II) and 31-222(a)(1)(B)(ii)(III) are conjunctive, the inability of the recipient of the service to satisfy any single one of those prongs necessarily results in a conclusion that an employer-employee relationship exists for purposes of the Connecticut Unemployment Compensation Act." *Latimer v. Administrator*, 216 Conn. 237, 252 (1990). In addition, General Statutes § 31-274(c) provides that the provisions of the chapter shall be construed, interpreted and administered in such a manner as to presume coverage, eligibility and nondisqualification in doubtful cases.

The first part of the ABC test, General Statutes § 31-222(a)(1)(B)(ii)(I), requires the appellant to establish that the claimant is free from control or direction in connection with the performance of his or her services, both under the contract for the performance of service and in fact. This is essentially the same as the common law independent contractor test. *F.A.S. International, Inc. v. Reilly*, 179 Conn. 507, 511-512, 427 A.2d 392 (1980); *Daw's Critical Care Registry, Inc. v. Dept. of Labor*, 42 Conn. Sup. 376, aff'd 225 Conn. 99 (1993). The critical factor is who has the right to direct and control what shall be done and when and how it shall be done. *Thompson v. Twiss*, 90 Conn. 444, 447 (1916); *Latimer v. Administrator*, supra at 248. An independent contractor is "one who, exercising an independent employment, contracts to do a piece of work according to his or her own methods and without being subject to the control of his or her employer, except as to the result of his or her work." *Darling v. Barrone Bros., Inc.*, 162 Conn. 187, 195, 292 A.2d 912 (1972), quoting *Alexander v. R.A. Sherman's Sons Co.*, 86 Conn. 292, 297, 85 A. 514 (1912).

Among the factors we examine to determine if there is a right to control the performance of the service are the retention of the right to discharge without liability, the right to general control of the day-to-day activities, how the hours when the individuals are to work are established, who furnishes materials and tools necessary to perform the service, whether the individual can subcontract the work, the manner of remuneration, and the agreement between the parties. See, e.g., *Daw's Critical Care Registry, Inc. v. Dept. of Labor*, supra. None of these factors, in and of itself, is dispositive; the primary inquiry is whether there is a right to control the performance of the service.

In the case before us, there are factors which tend to show that the appellant had the right to control the claimant's performance of his service. For example, the claimant was required to report at 8:00 a.m. to the appellant's place of business daily to pick up his work assignments. The claimant did not negotiate the fee for his services, but the rate was determined by the amount the contractor paid and the percentage withheld by the appellant. There is no evidence that the claimant ever subcontracted his work. The appellant had the right to and did inspect the claimant's work. If the work did not meet the appellant's expectations, the claimant had to make any necessary corrections to an installation in order to avoid having his fee reduced. By the appellant's contract with its contractor, MobilPro, the appellant had agreed to establish, maintain and follow MobilPro's policies and procedures.

On the other hand, certain factors exist which would tend to show that the appellant did not exercise control and direction. For example, the appellant required the claimant to sign an independent contractor agreement. The line item fee for a job was set by the appellant's contractor and not the appellant. The number of assignments the claimant was given was based on the hours the claimant was available.

On balance, the board concludes that the appellant had the right to exercise substantial control and direction over the scheduling, performance and financial aspects of the claimant's services, even if the policies and procedures were set by the contractor, MobilPro. Thus, the appellant has not met its burden of showing that the claimant was free from control and direction in the performance of his services.

Part B of the ABC test requires that the claimant's services either be performed outside the course of the business for which the service is performed or outside all the places of business of the enterprise for which the service is performed. This subtest is in the alternative, and the appellant need only establish that the service is either outside the course or the place of its business. The Connecticut Supreme Court has interpreted this provision to cover the specific business activities engaged in by the enterprise, rather than the type of business in general. The finder of fact must determine whether the activity is in the usual course of the specific business at issue. *Mattatuck Museum-Museum Historical Society v. Administrator*, 238 Conn. 273 (7/23/96).

In the case before us, although the claimant reported to the appellant's place of business daily to return completed orders and obtain new orders, the claimant's services were performed at the customers' homes. Since the customers were obtained by and billed by the contractor, MobilPro, they were essentially the clients of Mobilpro. Therefore, even under the doctrine that the individual job site at which the appellant contracted to provide service is a place of business, see *Greatorex v. Stone Hill Remodeling*, Board Case No. 1169-BR-88 (1/9/88), aff'd sub nom. *Stone Hill Remodeling v. Administrator*, Superior Court, Judicial District of Waterbury, Docket No. 089398 (February 21,

1991); *Feschler v. Hartford Dialysis*, Board Case No. 995-BR-88, (12/27/88), the appellant had not entered into the individual contracts with the customers. We, therefore, find that the appellant has satisfied Part B of the ABC test because the claimant's services were performed outside all the places of business of the enterprise for which the service is performed.

The final subtest of the "ABC" test requires the appellant to establish that the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that of the service performed. The adverb "independently" modifies the word "established" and has been construed to mean that the trade, occupation, profession or business was established independent of the contracting entity. See *JSF v. Administrator*, 265 Conn. 413, 828 A.2d 609 (2003). An activity which the individual "is customarily engaged in" requires that the individual "must be engaged in such independently established activity at the time of rendering the service which is the subject of the inquiry." *Daw's Critical Case Registry, Inc. v. Dep't of Labor*, supra at 407. An established business or profession is one that is permanent, stable, fixed or lasting, and the enterprise must exist separate and apart from the relationship with the contracting entity and survive the termination of that relationship. *Id.*, citing *F.A.S. International, Inc. v. Administrator*, 179 Conn. 507, 515, 427 A.2d 392 (1980). The statute does not require that an individual merely be able to engage in activity independent of that of the employer, but that the individual must be customarily engaged and holding himself or herself out to the public as being engaged in the independent activity at the time of rendering the service. *Feschler v. Hartford Dialysis*, supra.

Among the factors we examine under Part C of the "ABC" test are the existence of business cards or letterhead, advertising one's services, having a place of business, having an established clientele, having a contractor's or business license or special skills acquired through an apprenticeship period, and having a substantial investment in tools to perform the service. See *New Sleep, Inc. v. Department of Employment Security*, 703 P. 2d 289, 291 (Utah, 1985). Other relevant factors include the investment of risk capital, the employment of others, the performance of services for more than one person, the separation of the individual's business establishment from the premises of the person for whom the services are performed, the performance of services under the individual's name rather than the name of the person for whom the services are performed, the offering of services to the public or customers, whether the performance of services affects the good will of the individual rather than that of the person for whom the services are performed, and whether there is a saleable, going business concern. See *Tracy v. The Norwich Bulletin,* Board Case No. 9030-BR-93 (12/12/95); *Dionne v. Nelson Freightways,* Board Case No. 691-BR-89 (10/6/89).

In the case before us, the claimant did not have a business card or advertise or offer his services to the public. He did not have his own clientele or a place of business, sales tax number, or business accounts. The claimant did not perform services or accrue any good will through under his own name. The claimant did not have liability insurance. The appellant carried liability insurance and took a deduction for workers' compensation coverage from the claimant's pay. The claimant was performing services only for the appellant.

The claimant was licensed as a V-4 Limited Antenna Dish Installer. Pursuant to General Statutes § 20-353(c), the Connecticut Department of Consumer Protection may issue a limited antenna dish installer license after completing an apprenticeship program established and approved by the apprenticeship training division of the Labor Department, and passing an examination approved or administered by the Department of Consumer Protection. According to the Connecticut Department

of Consumer Protection Occupational Licensing Bulletin, of which we take official notice, a V-4 Limited Antenna Dish Technician may be issued after 120 hours of apprenticeship or on the job training and successfully completing an open book examination. The scope of the V-4 license allows for the service, installation, maintenance, repair, replacement, inspection or modification of certain-sized satellite dishes while in the employ of a dealer or dealer-technician licensed for such work. Although the claimant had a license acquired through an apprenticeship period, it was a limited license and the claimant could not work independently or establish an independent business based on his license.

The claimant had previously worked as an installer for other entities, at times being considered an employee, and at other times a contractor. The claimant used his own van and purchased from the appellant his own tools and materials, except for the receiver and dish which were provided to him by the appellant. The claimant was not reimbursed for his expenses. The appellant issued the claimant a 1099 form each year. We find that the weight of the evidence fails to establish that the claimant was customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed for the appellant.

We, therefore, find that the appellant has failed to establish that the claimant was free from the appellant's control and direction with the performance of his service, or that he was customarily engaged in an independently established trade, occupation, profession or business. Since the appellant has not proven Parts A and C of the ABC test, the claimant's service is considered covered employment for purposes of the Connecticut Unemployment Compensation Act. In so ruling, we adopt the referee's findings of fact, except that we add the following findings of fact:

> 19. By the appellant's contract with MobilPre, the appellant had agreed to establish, maintain and follow MobilPro's policies and procedures.
>
> 20. Pursuant to General Statutes § 20-353(c), the Connecticut Department of Consumer Protection may issue a limited antenna dish installer license after completing an apprenticeship program established and approved by the apprenticeship training division of the Labor Department, and passing an examination approved or administered by the Department of Consumer Protection. According to the Connecticut Department of Consumer Protection Occupational Licensing Bulletin, a V-4 Limited Antenna Dish Technician may be issued after 120 hours of apprenticeship or on the job training and successfully completing an open book examination. The scope of the V-4 license allows for the service, installation, maintenance, repair replacement, inspection or modification of certain-sized satellite dishes while in the employ of a dealer or dealer-technician licensed for such work.

V. DISPOSITION AND ORDER

The referee's decision is **affirmed**, as modified, and the appeal is **dismissed**. The claimant was engaged in an employment relationship with the appellant.

BOARD OF REVIEW

Lynne M. Knox, Chair,
ES Board of Review

In this decision, Board Member Elizabeth S. Wagner concurs.

LMK:SSW:mle

IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY NOVEMBER 8, 2010. SEE LAST PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL RIGHTS.

(2-88)

Department of Labor
Employment Security Appeals Division
Board of Review
200 Folly Brook Blvd.
Wethersfield, CT 06109

CE 3-00

IMPORTANTE - TENGA ESTO TRADUCIDO
INMEDIATAMENTE - TIEMPO LIMITADO PARA APELAR

Claimant's Name, Address & S.S. No.

William Greatorex
57 Overlook Street
Waterbury, Ct. 06708

SS# 044-54-6030

Board Case No: 1169-BR-88

1. Appeal from Referee's determination dated: November 10, 1988 Case No: 1635-EE-88
2. Date appeal filed: November 25, 1988
3. Appealed by: Employer
4. Date mailed to interested parties: January 9, 1989

Employer's Name, Address & Reg. No.

Stone Hill Remodeling
P.O. Box 202
Woodbury, Ct. 06798
Attn: Chris Sayer

cc: Atty. M G Ouellette
390 Middlebury Rd.
P.O. Box 269
Middlebury, Ct.06762

cc: Daniel Metz, Field Audit
Wethersfield

cc: Ed Robinson, Field Audit
Waterbury

DECISION OF THE BOARD OF REVIEW

Provisions of the Connecticut General Statutes involved:
Section 31-222(a)(B)(ii).

CASE HISTORY - SOURCE OF APPEAL:

The Administrator ruled that the claimant was an employee of the appellant by a decision issued on July 18, 1988.

The employer appealed the Administrator's decision on July 25, 1988.

Appeals Referee Richard T. Carney affirmed the Administrator's ruling by a decision issued on November 10, 1988.

The employer appealed the Referee's decision to the Board of Review on November 25, 1988.

Acting under authority contained in Section 31-249 of the Connecticut General Statutes, the Board of Review has reviewed the record in this appeal, including the tape recording of the Referee's hearing.

The Referee ruled that the claimant was an employee rather than a subcontractor, and that the appellant is liable pursuant to the Unemployment Compensation Act for contributions for wages paid the claimant. The Referee concluded that the claimant worked under the direction of the appellant employer and assisted in carpentry work. The Referee also found insufficient evidence that the claimant was customarily engaged in an independently established profession. The Referee thus concluded that the claimant's services failed to come within the narrow exception to covered employment created by Conn. Gen. Stat. § 31-222(a)(B)(ii). The Board concurs with the Referee's determination.

The record reveals that the appellant is licensed as a home improvement contractor and is engaged in residential remodeling. While the firm normally performs carpentry work, trim, and siding, it is the customary practice to subcontract with individuals licensed to do electrical or plumbing work because the appellant is not licensed for this work. Subcontractors generally bid for a particular job, and the appellant pays a fee for the work on the basis of the bid. The claimant received an hourly rate for the work he performed for the subject employer, based upon his job bid. The appellant did not deduct taxes or social security contributions from the remuneration paid. The appellant provided some of the necessary tools and materials and reimbursed the claimant for those materials which he purchased. In addition to the plumbing and electrical work, the claimant did some carpentry and siding as well, at times working with the owner of the firm.

Employment subject to the Unemployment Compensation Act includes any service by an individual who has the status of an employee. Services performed by an individual will be deemed employment regardless of the existence of the common law relationship of master and servant

> unless and until it is shown to the satisfaction of the Administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Conn. Gen Stat. § 31-222(a)(B)(ii). Where a statute creates an exception to a general rule, it is to be strictly construed. The party claiming the

exception has the burden of proving that it comes within the limited class for whose benefit the exception was created. Conservation Commission of Town of Simsbury v. Price, 193 Conn. 414, 479 A.2d 187 (1984). The statute, the so-called ABC test, is in the conjuctive, and the appellant bears the burden of showing that it has satisfied all three prongs of the test before the claimant's services will be exempted from employment. F.A.S. International v. Reilly, 179 Conn. 507, 427 A.2d 392 (1980).

The appellant contends in support of its appeal that the claimant was free from direction and control by the appellant since the claimant was engaged in work outside the knowledge and skill of the employer. The appellant maintains that the claimant performed work outside the usual course of business of the employer since the appellant is not licensed to do plumbing or electrical work, and that the claimant is engaged in the independent profession of a licensed electrician and plumber and works for other contractors performing these services. The appellant maintains that the Referee relied too heavily on the fact that the claimant occasionally performed carpentry work for the appellant.

The first prong of the ABC test requires that an individual be free from control and direction, both under contract and in fact, in connection with the performance of the service. The test is essentially the common law test for independent contractors, which considers whether there is a right to control the means and method of work. F.A.S. International, Inc. v. Reilly, supra. The appellant's position is that the claimant has contracted to do the electrical and plumbing work according to his own methods and that he is not subject to direction by the appellant, which has no knowledge of plumbing and electrical work, except as to the results. The record reveals, however, that the claimant was not exclusively engaged in plumbing and electrical work. The claimant also performed carpentry work, at times working side by side with the appellant owner. The appellant furnished the claimant with tools and materials, indicating an element of control. A continuous relationship existed between the claimant and the appellant, since the claimant had performed services for the appellant for more than one year. The carpentry work performed by the claimant was under the supervision of the appellant. The claimant was paid the same hourly rate regardless of the nature of the work performed. The appellant argues that the claimant was not under its exclusive control. However, the appellant has failed to meet its burden of demonstrating that the claimant, in performing his service to the appellant, was free from control and direction.

To satisfy part B of the ABC test, the appellant must show that the service performed was outside the usual course of the business for which the service is performed or is outside of all places of business of the enterprise for which the service is performed. Conn. Gen. Stat. § 31-222(a)(1)(B)(ii)(II). The claimant did not perform his service outside the place of the appellant's business. The claimant performed his services at the construction sites secured by the appellant, and these job sites had by contract become the appellant's place of business. See Feshler v. Hartford Dialysis, Board

Case No. 995-BR-88 (12/27/88). On the other hand, the appellant argues that plumbing and electrical work are outside its usual course of business since it is not licensed to do such work. While the appellant would not have been precluded from performing such work under its home improvement registration if it had the necessary licenses, the appellant has testified that, since it lacked the individual licenses, its normal business practice was to sub-contract for this work. However, while the plumbing and electricial work were outside the usual course of the appellant's business, the carpentry work was precisely the business in which the appellant was engaged.

We need not decide whether, if some of the services performed for the appellant were outside the course of the appellant's business and other services were part of the appellant's business, the claimant might be determined to be an independent contractor in the performance of the former services but an employee in the performance of the latter services. We are aware of a policy letter of the Employment Security Division of the State of Connecticut, dated July 17, 1942, which indicates that where an individual is working both in covered employment and in employment specifically excluded by statute, the employer should keep an exact record of the time spent by the employee in each type of employment, and the matter would be resolved in as equitable a manner as possible. 2 Unempl. Ins. Rep. (CCH) ¶1335.04 (4/7/78). This policy letter lacks the force of law. Moreover, whether the policy continues to be viable and whether it would apply to a situation in which an individual is engaged partly in self-employment as an independent contractor but also performs services as an employee, we need not reach here. The appellant has paid the claimant the same wages for all his services and has not kept records of the wages paid for the particular services performed. In any event, for the reasons set forth below, we conclude that the appellant has failed to establish part C of the ABC test. Therefore, none of the claimant's services can be excluded from employment under § 31-222(a)(B)(ii).

The final prong of the ABC test provides that for service to be exempt from employment the individual performing the service must be "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." Conn. Gen. Stat. § 31-222(a)(B)(ii)(III). This provision requires a showing that the individual concurrently performs such services in business ventures independent from his connection with the principal. See F.A.S. International Inc, v. Reilly, supra; Feshler v. Hartford Dialysis, supra. In the case before us, the appellant contends that the claimant worked for other contractors, but it did not provide specific examples of any independent work. The appellant failed to document that the claimant had an independent business by introducing a business card, invoice, or letter-head. Furthermore, the Board of Review takes official notice that the Department of Consumer Protection of the State of Connecticut has no record than an electrician's or plumber's license was ever issued to William Greatorex. Since the claimant does not have an independently established trade or profession, we conclude that the appellant has failed to satisy part C of the ABC test.

Since the appellant has failed to meet its statutory burden of establishing that the claimant's services come within the exception to employment, we must conclude that the claimant's services are covered employment and that the appellant is an employer within the meaning of the Unemployment Compensat-ion Act. The decision of the Referee is affirmed, and the appellant's appeal is dismissed. In so ruling, the Board adopts the Referee's findings of fact as modified above.

BOARD OF REVIEW

Bennett Pudlin, Chairman

In this decision Board member Glenn Williams concurs.

BP/oc

Stone Hill Remodeling v. Administrator, Unemployment Compensation Act
Superior Court of Connecticut, Judicial District of Waterbury. February 21, 1991 Not Reported in A.2d 3 Conn. L. Rptr. 829 (Approx. 3 pages)

1991 WL 32698

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Superior Court of Connecticut, Judicial District of Waterbury.

STONE HILL REMODELING

v.

ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT, et al.

No. 089398. Feb. 21, 1991.

MEMORANDUM OF DECISION

BLUE, Judge.

*1 This is an administrative appeal challenging the defendant's finding of an employer-employee relationship between the plaintiff employer and one William Greatorex. For the reasons stated below, the appeal is dismissed.

The underlying facts of this case are described by the Board of Review as follows:

The record reveals that the appellant [plaintiff] is licensed as a home improvement contractor and is engaged in residential remodeling. While the firm normally performs carpentry work, trim, and siding, it is the customary practice to subcontract with individuals licensed to do electrical or plumbing work because the appellant is not licensed for this work. Subcontractors generally bid for a particular job, and the appellant pays a fee for the work on the basis of the bid. The claimant received an hourly rate for the work he performed for the subject employer, based upon his job bid. The appellant did not deduct taxes or social security contributions from the remuneration paid. The appellant provided some of the necessary tools and materials and reimbursed the claimant for those materials which he purchased. In addition to the plumbing and electrical work, the claimant did some carpentry and siding as well, at times working with the owner of the firm.

Decision of Board of Review at 2.

Greatorex worked for the plaintiff during all four quarters of the calendar year 1987 and, in June of 1988, applied for unemployment benefits claiming a voluntary separation from employment. After a subsequent investigation by a field auditor, the defendant determined that Greatorex was an employee of the plaintiffs. The plaintiff filed a timely appeal, and a hearing was held before a referee on September 6, 1988. On November 10, 1988, the *referee affirmed the defendant's determination. An appeal from this decision was timely filed.* On January 9, 1989, the Board of Review affirmed the decision of the referee with some modification of his findings of fact. An appeal to this court was filed on February 8, 1990. A hearing was held on February 13, 1991.

The term "employment" is defined in Conn.Gen.Stat. Sec. 31-222(a)(1). "Besides codifying the common law rules used to determine the existence of an employer-employee relationship, the [statute includes] the use of what is popularly known in Connecticut and throughout the country in similar legislation as the 'ABC test.' " *Latimer v. Administrator,* 216 Conn. 237, 245-46, 579 A.2d 497 (1990). Under this test,

Service performed by an individual shall be deemed to be employment ... irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

*2 Conn.Gen.Stat. Sec. 31-222(a)(1)(B). "In order to demonstrate that he is not an employer and therefore has no liability to unemployment taxes ... a recipient of services must show

that he has satisfied the criteria necessary to establish nonliability under all three prongs of the ABC test." *Latimer v. Administrator, supra,* 216 Conn. at 246-47. Put another way, "[b]ecause the prongs of the ABC test ... are conjunctive, the inability of the recipient of services to satisfy any single one of these prongs necessarily results in a conclusion that an employee-employer relationship exists." *Id.* at 252.

The Board of Review below determined that the plaintiff failed to satisfy either parts A or C of the ABC test. (It found the facts and law sufficiently unclear that it did not reach a conclusion as to part B.) As to part A, which requires a showing that the individual in question was "free from control and direction in connection with the performance of [his] service," the Board noted that, in addition to electrical and plumbing work, Greatorex "performed carpentry work, at times working side by side with the appellant owner. The appellant furnished the claimant with tools and materials, indicating an element of control.... The carpentry work performed by the claimant was under the supervision of the appellant." As to Part C, which requires a showing that the individual "is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed," the Board found that, "[t]he appellant failed to document that the claimant had an independent business by introducing a business card, invoice, or letter head. Furthermore, the Board of Review takes official notice that the Department of Consumer Protection of the State of Connecticut has no record that an electrician's or plumber's license was ever issued to William Greatorex."

"The determination of the status of an individual as an independent contractor is often difficult ... and, in the absence of controlling considerations, is a question of fact." *Robert C. Buell & Co. v. Danaher,* 127 Conn. 606, 610, 18 A.2d. 697 (1941). "In appeals of this nature the court cannot substitute its discretion for that legally vested in the [Administrator] but determines on the record whether there is a logical and rational basis for the decision of the Commissioner or whether, in the light of the evidence, he has acted illegally or in abuse of his discretion." *Taminski v. Administrator,* 168 Conn. 324, 326, 362 A.2d 868 (1975). After a thorough review of the record, the court is convinced that there was no abuse of discretion here.

As to Part A of the ABC test, the defendant Administrator could reasonably have concluded that-at least with respect to carpentry work-the right to general control of Greatorex's activities vested with the plaintiff. "At the least, he could reasonably have determined that the plaintiff had failed to sustain his burden of showing that [Greatorex was] free from [its] control and direction in the rendering of [his] services." *Latimer v. Administrator, supra,* 216 Conn. at 249.

*3 The case is even more clear-cut with respect to part C of the ABC test. Here, there was a simple lack of proof by the plaintiff that Greatorex was customarily engaged in an independently established trade of the same nature as that involved in the service performed here. The plaintiff, on appeal as was the case below, has pointed to no evidence that would substantiate a finding of this nature. The fact that the plaintiff filed a Form 1099 concerning Greatorex with the Internal Revenue Service-apart from the fact that the filing of this form by the plaintiff cannot possibly be conclusive as to the defendant with respect to any fact contested here-is wholly irrelevant to this issue. Since the plaintiff altogether failed to carry its burden of proof on this issue, the Administrator had no choice but to conclude that an employer-employee relationship existed.

For the reasons stated above, the appeal is dismissed.

Dated at Waterbury this 21st day of February, 1991.

Parallel Citations

3 Conn. L. Rptr. 829

End of Document

Appellee, v. Steven P. CORDOVANO and Sarah M. Cordovano, Defendants-Appellants.
Supreme Court of Connecticut
June 03, 2005

...On July 31, 2002, the Plaintiff, D'Angelo Development and Construction Corporation ("D'Angelo"), a building contractor, filed two mechanic's liens, one in the amount of $72,606.59, and the other in the...

See More Briefs

Trial Court Documents

Bahjat v. Dadi

2008 WL 4887729
Bahjat v. Dadi
Superior Court of Connecticut, Hartford County
August 05, 2008

...The plaintiffs, Nabil Bahjat, and Barbara Bahjat, husband and wife, bring this action against the defendant Ahmed A. Dadi, dba Total Design/Dadi Associates for breach of an agreement between the partie...

CHAPTER 567*

UNEMPLOYMENT COMPENSATION

*See chapter 57b re transfer of certain state employees' workers' compensation claims to third-party loss portfolio arrangement program.

Cited. 125 C. 184; Id., 300; 126 C. 116; Id., 441; 127 C. 176; Id., 607; 128 C. 80. Purpose of act. Id., 81. Cited. *Id., 216*; Id., 342; 129 C. 568. Unless provisions of act differ from federal act, they are to be interpreted alike. 131 C. 507. Cited. 132 C. 647; 133 C. 114; 142 C. 163. Definition of "labor dispute" applicable to chapter. 145 C. 77. Cited. 153 C. 691; 171 C. 317. Action of administrator cannot be sustained because of location of penalty provision of Sec. 31-225a(c)(1) within the act and the ambiguity of its language. 177 C. 384. Cited. 179 C. 507; 192 C. 104; 196 C. 440; Id., 546; 209 C. 381. "Employee" versus "independent contractor" discussed. 216 C. 237. Cited. 231 C. 690; 238 C. 273.

Cited. 2 CA 1; 3 CA 258; Id., 264; 4 CA 183; 25 CA 130; 34 CA 620; 41 CA 751; 44 CA 105.

Cited. *9 CS 71; Id., 429. Act to be liberally construed.* 12 CS 391. Cited. 40 CS 208; 42 CS 376.

Sec. 31-222. Definitions. As used in this chapter, unless the context clearly indicates otherwise:

(a) (1) "Employment", subject to the other provisions of this subsection, means:

(A) Any service, including service in interstate commerce, and service outside the United States, performed under any express or implied contract of hire creating the relationship of employer and employee;

(B) Any service performed prior to January 1, 1978, which was employment as defined in this subsection prior to such date and, subject to the other provisions of this subsection, service performed after December 31, 1977, including service in interstate commerce, by any of the following: (i) Any officer of a corporation; (ii) any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed; (iii) any individual other than an individual who is an employee under clause (i) or (ii) who performs services for remuneration for any person (I) as an agent-driver or commission driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages, other than milk, or laundry or dry-cleaning services, for his principal; (II) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal, except for sideline sales activities on behalf of some other person, of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants or other similar establishments for merchandise for resale or supplies for use in their business operations; provided, for purposes of subparagraph (B) (iii), the term "employment" shall include services described in clause (I) and (II) above performed after December 31, 1971, if 1. the contract of service contemplates that substantially all of the services are to be performed personally by such individual; 2. the individual does not have a substantial investment in facilities used in connection with the performance of the services, other than in facilities for transportation; and 3. the services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed;

Sec. 31-237j. Appeals to referee section; jurisdiction, venue; panel of referees. (a) The referees shall promptly hear and decide appeals from the decisions of the administrator of this chapter, or his designee, appeals from all other determinations made pursuant to any provision of this chapter and appeals from any proceeding conducted by authorized personnel of the Employment Security Division pursuant to directives of the United States of America and the Secretary of Labor of the United States. Except as otherwise provided in this chapter or in the applicable federal directives, appeals to referees shall be filed within the time limits and under the conditions prescribed in section 31-241.

(b) The referees shall have state-wide jurisdiction and venue, and referee proceedings shall be conducted (1) by telephone or other electronic means, or (2) at the request of either party, in person at locations within the state designated by the executive head of the Employment Security Appeals Division.

(c) The chief referee may appoint a panel of three referees to hear and decide any appeal involving (1) complex issues of fact, (2) complex issues of law, (3) multiple parties, or (4) numerous witnesses. The decision on all such appeals shall be by a majority vote of the full panel.

(P.A. 74-339, S. 10, 11, 36; P.A. 81-5, S. 3; P.A. 88-53, S. 2; 88-72; P.A. 12-125, S. 2.)

Sec. 31-248. Decisions of employment security referee; final date, notice; reopening; judicial review. (a) Any decision of a referee, in the absence of a timely filed appeal from a party aggrieved thereby or a timely filed motion to reopen, vacate, set aside or modify such decision from a party aggrieved thereby, shall become final on the twenty-second calendar day after the date on which a copy of the decision is mailed to the party, provided (1) any such appeal or motion which is filed after such twenty-one-day period may be considered to be timely filed if the filing party shows good cause, as defined in regulations adopted pursuant to section 31-249h, for the late filing, (2) if the last day for filing an appeal or motion falls on any day when the offices of the Employment Security Division are not open for business, such last day shall be extended to the next business day, and (3) if any such appeal or motion is filed by mail, such appeal or motion shall be considered to be timely filed if it was received within such twenty-one-day period or bears a legible United States postal service postmark which indicates that within such twenty-one-day period, it was placed in the possession of such postal authorities for delivery to the appropriate office. Posting dates attributable to private postage meters shall not be considered in determining the timeliness of appeals or motions filed by mail.

(b) Any decision of a referee may be reopened, set aside, vacated or modified on the timely filed motion of a party aggrieved by such decision, or on the referee's own timely filed motion, on grounds of new evidence or if the ends of justice so require upon good cause shown. The appeal period shall run from the mailing of a copy of the decision entered after any such reopening, setting aside, vacation or modification, or a decision denying such motion, as the case may be, provided no such motion from any party may be accepted with regard to a decision denying a preceding motion to reopen, vacate, set aside or modify filed by the same party. An appeal to the board from a referee's decision may be processed by the referee as a motion for purposes of reopening, vacating, setting aside or modifying such decision, solely in order to grant the relief requested.

(c) Judicial review of any decision shall be permitted only after a party aggrieved thereby has exhausted his remedy before the board, as provided in this chapter. The administrator shall be deemed to be a party to any judicial proceeding involving any such decision and shall be represented in such proceeding by the Attorney General.

(1949 Rev., S. 7520; 1971, P.A. 835, S. 25; P.A. 74-339, S. 21, 36; P.A. 77-426, S. 11, 19; P.A. 80-260, S. 2; P.A. 81-5, S. 6; P.A. 87-364, S. 3, 8.)

Sec. 31-249b. Appeal. At any time before the board's decision has become final, any party, including the administrator, may appeal such decision, including any claim that the decision violates statutory or constitutional provisions, to the superior court for the judicial district of Hartford or for the judicial district wherein the appellant resides. Any or all parties similarly situated may join in one appeal. In such judicial proceeding the original and five copies of a petition, which shall state the grounds on which a review is sought, shall be filed in the office of the board. The chairman of the board shall, within the third business day thereafter, cause the original petition or petitions to be mailed to the clerk of the Superior Court and copy or copies thereof to the administrator and to each other party to the proceeding in which such appeal was taken; and said clerk shall docket such appeal as returned to the next return day after the receipt of such petition or petitions. In all cases, the board shall certify the record to the court. The record shall consist of the notice of appeal to the referee and the board, the notices of hearing before them, the referee's findings of fact and decision, the findings and decision of the board, all documents admitted into evidence before the referee and the board or both and all other evidentiary material accepted by them. Upon request of the court, the board shall (1) in cases in which its decision was rendered on the record of such hearing before the referee, prepare and verify to the court a transcript of such hearing before the referee; and (2) in cases in which its decision was rendered on the record of its own evidentiary hearing, provide and verify to the court a transcript of such hearing of the board. In any appeal, any finding of the referee or the board shall be subject to correction only to the extent provided by section 22-9 of the Connecticut Practice Book. Such appeals shall be claimed for the short calendar unless the court shall order the appeal placed on the trial list. An appeal may be taken from the decision of the Superior Court to the Appellate Court in the same manner as is provided in section 51-197b. It shall not be necessary in any judicial proceeding under this section that exceptions to the rulings of the board shall have been made or entered and no bond shall be required for entering an appeal to the Superior Court. Unless the court shall otherwise order after motion and hearing, the final decision of the court shall be the decision as to all parties to the original proceeding. In any appeal in which one of the parties is not represented by counsel and in which the party taking the appeal does not claim the case for the short calendar or trial within a reasonable time after the return day, the court may of its own motion dismiss the appeal, or the party ready to proceed may move for nonsuit or default as appropriate. When an appeal is taken to the Superior Court, the clerk thereof shall by writing notify the board of any action of the court thereon and of the disposition of such appeal whether by judgment, remand, withdrawal or otherwise and shall, upon the decision on the appeal, furnish the board with a copy of such decision. The court may remand the case to the board for proceedings de novo, or for further proceedings on the record, or for such limited purposes as the court may prescribe. The court also may order the board to remand the case to a referee for any further proceedings deemed necessary by the court. The court may retain jurisdiction by ordering a return to the court of the proceedings conducted in accordance with the order of the court or the court may order final disposition. A party aggrieved by a final disposition made in compliance with an order of the Superior Court, by the filing of an appropriate motion, may request the court to review the disposition of the case.

(P.A. 74-339, S. 25, 36; P.A. 75-339; P.A. 76-436, S. 620, 681; P.A. 78-280, S. 1, 5, 127; P.A. 79-376, S. 32; P.A. 80-428; P.A. 81-472, S. 64, 159; P.A. 82-472, S. 107, 183; June Sp. Sess. P.A. 83-29, S. 14, 82; P.A. 88-230, S. 1, 12; P.A. 90-98, S. 1, 2; P.A. 93-142, S. 4, 7, 8; P.A. 95-220, S. 4–6; P.A. 00-196, S. 20; P.A. 07-193, S. 2.)

Sec. 31-270. Failure of employer to file report of contributions due. Appeal from action of administrator. If an employer fails to file a report for the purpose of determining the amount of contributions due under this chapter, or if such report when filed is incorrect or insufficient and the employer fails to file a corrected or sufficient report within twenty days after the administrator has required the same by written notice, the administrator shall determine the amount of contribution due, with interest thereon pursuant to section 31-265, from such employer on the basis of such information as he may be able to obtain and he shall give written notice of such determination to the employer. Such determination shall be made not later than three years subsequent to the date such contributions became payable and shall finally fix the amount of contribution unless the employer, within thirty days after the giving of such notice, appeals to the superior court for the judicial district of Hartford or for the judicial district in which the employer's principal place of business is located. Said court shall give notice of a time and place of hearing thereon to the administrator. At such hearing the court may confirm or correct the action of the administrator. If the action of the administrator is confirmed or the amount of the contribution determined by the administrator is increased, the cost of such proceedings, as in civil actions, shall be assessed against the employer. No costs shall be assessed against the state on such appeal. The amount of any judgment rendered in such proceedings, with costs, shall be collected either on execution, as provided in civil actions, or as provided in section 31-266.

(1949 Rev., S. 7540; 1953, S. 3088d; 1967, P.A. 790, S. 19; 1969, P.A. 456; P.A. 78-280, S. 2, 6, 127; P.A. 88-230, S. 1, 12; P.A. 90-98, S. 1, 2; P.A. 93-142, S. 4, 7, 8; P.A. 95-220, S. 4–6.)

Sec. 31-274. Saving clause. Conflict with federal law. Governmental districts and subdivisions defined. (a) The General Assembly reserves the right to amend or repeal all or any part of this chapter at any time, and no vested private right shall prevent such amendment or repeal. All of the rights, privileges or immunities conferred by this chapter or by acts done pursuant thereto, shall exist subject to the power of the General Assembly to amend or repeal it at any time.

(b) No part of this chapter shall be deemed repealed by subsequent legislation if such construction can reasonably be avoided.

(c) The provisions of this chapter shall be construed, interpreted and administered in such manner as to presume coverage, eligibility and nondisqualification in doubtful cases.

(d) In the event of any conflict between any provision of this chapter and applicable federal law in respect to payment of benefits, coverage or eligibility, the federal law shall prevail if said federal law increases or extends benefits, coverage or eligibility beyond the provisions of this chapter, and the provisions of this chapter shall be construed to be in conformity with the law of the United States.

(e) As applied to this chapter, any amendment in the statute law of the United States which would by implication amend or repeal any provision of this chapter, where such amendment or repealer will increase or extend benefits, coverage or eligibility, shall be deemed and construed to be a provision of this chapter and the law of this state.

(f) As used in any of the provisions of this chapter, the clause "governmental districts, regions or entities, established under state statutes", and the phrases "political and governmental subdivisions", "political or governmental subdivision or entity" and similar terms shall be construed and interpreted to include any and all political subdivisions of this state, including, without limitation, any town, city, county, borough, district, school board, board of education, board of regents, social service or welfare agency, public and quasi-public corporation, housing authority, parking authority, redevelopment and urban renewal board or commission, or other authority or public agency established by law, irrespective of whether such authority or agency has power to hire and discharge employees separate and apart from any other political or governmental subdivision of which it is a part, or with which it may be affiliated, and any water district, sewer district or similar authority established by special act or existing under the general statutes of this state.

(1949 Rev., S. 7544; 1971, P.A. 835, S. 32.)

Sec. 22-4. Correction of Finding; Motion to Correct Finding

If the appellant desires to have the finding of the board corrected he or she must, within two weeks after the record has been filed in the superior court, unless the time is extended for cause by the board, file with the board a motion for the correction of the finding and with it such portions of the evidence as he or she deems relevant and material to the corrections asked for, certified by the stenographer who took it; but if the appellant claims that substantially all the evidence is relevant and material to the corrections sought, he or she may file all of it, so certified, indicating in the motion so far as possible the portion applicable to each correction sought. The board shall forthwith upon the filing of the motion and of the transcript of the evidence, give notice to the adverse party or parties.

(P.B. 1978-1997, Sec. 515A.)

Sec. 22-9. Function of the Court

(a) Such appeals are heard by the court upon the certified copy of the record filed by the board. The court does not retry the facts or hear evidence. It considers no evidence other than that certified to it by the board, and then for the limited purpose of determining whether the finding should be corrected, or whether there was any evidence to support in law the conclusions reached. It cannot review the conclusions of the board when these depend upon the weight of the evidence and the credibility of witnesses. In addition to rendering judgment on the appeal, the court may order the board to remand the case to a referee for any further proceedings deemed necessary by the court. The court may remand the case to the board for proceedings de novo, or for further proceedings on the record, or for such limited purposes as the court may prescribe. The court may retain jurisdiction by ordering a return to the court of the proceedings conducted in accordance with the order of the court, or may order final disposition. A party aggrieved by a final disposition made in compliance with an order of the superior court may, by the filing of an appropriate motion, request the court to review the disposition of the case.

(b) Corrections by the court of the board's finding will only be made upon the refusal to find a material fact which was an admitted or undisputed fact, upon the finding of a fact in language of doubtful meaning so that its real significance may not clearly appear, or upon the finding of a material fact without evidence.

(P.B. 1978-1997, Sec. 519.)